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No. 93-7901

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1993

LLOYD EUGENE SCHLUP,

Petitioner,

v.

PAUL DELO,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

Petitioner, Lloyd Eugene Schlup, was convicted, after a change of venue, in the Circuit Court of St. Charles County, Missouri, of capital murder, §565.001, RSMo 1978 (repealed effective October 1, 1984), and was sentenced to death. The conviction and sentence were affirmed on direct appeal. State v. Schlup, 724 S.W.2d 236 (Mo. banc 1987), cert. denied, 482 U.S. 920 (1987).

On July 13, 1987, petitioner filed a post-conviction relief motion pursuant to Missouri Supreme Court Rule 27.26 (repealed January 1, 1988) in the Circuit Court of St. Charles County, Missouri. The circuit court denied petitioner's post-conviction relief motion, and the Missouri Supreme Court affirmed. Schlup v. State, 758 S.W.2d 715 (Mo. banc 1988).

On January 5, 1989, petitioner filed a pro se petition for writ of habeas corpus pursuant to 28 U.S.C. §2254, in the United States District Court, Eastern District of Missouri. On February 3, 1989, the district court appointed David C. Howard and Caterina DiTraglia to represent petitioner in his habeas corpus proceeding. Counsels filed an amended petition on March 7, 1989. After responsive pleadings, the Honorable William L. Hungate denied petitioner's petition for writ of habeas corpus on November 21, 1989. The district court's denial of petitioner's petition was affirmed by the Eighth Circuit Court of Appeals on July 22, 1991. See Schlup v. Armontrout, 941 F.2d 631 (8th Cir. 1991), cert. denied, 112 S.Ct. 1273 (1992).

After this Court denied petitioner's petition for writ of certiorari, petitioner filed a motion to alter or amend judgment pursuant to Fed.R.Civ.P. 60(b)(6) in the district court. The district court denied petitioner's Rule 60(b)(6) motion. See Schlup v. Armontrout, No. 89-0020-C-3 (E.D.Mo., March 10, 1992) (unpublished opinion).

On March 11, 1992, petitioner filed his third petition for writ of habeas corpus in the United States District Court, Eastern District of Missouri.[1] After responsive pleadings, the district court denied petitioner's petition for writ of habeas corpus. See Schlup v. Delo, No. 4:92CV00443JCH (E.D.Mo., August 23, 1993) (unpublished opinion). The district court's denial of petitioner's petition was affirmed by the Eighth Circuit Court of Appeals. Schlup v. Delo, 11 F.3d 738 (8th Cir. 1993). The Eighth Circuit deemed the case unworthy for rehearing en banc. Id. at 754.

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[1]Petitioner's Rule 60(b)(6) motion constituted a second petition for writ of habeas corpus under Eighth Circuit precedents. See Blair v. Armontrout, 976 F.2d 1130, 1134 (8th Cir. 1992), cert. denied, 113 S.Ct. 2357 (1993) (treating a Rule 60(b) motion as a second petition for writ of habeas corpus); Bolder v. Delo, 983 F.2d 98, 99 (8th Cir. 1992), cert. denied, 113 S.Ct. 1070 (1993) (same).

ARGUMENT

Petitioner presents three questions for review by this Court. Since petitioner fails to demonstrate any conflict between the appellate court opinion and the opinions of this Court or other appellate courts and since petitioner fails to demonstrate a significant issue of federal law that has not been but should be resolved by this Court, the Court should decline to issue a writ of certiorari. Supreme Court Rule 10.1

In petitioner's third petition for writ of habeas corpus, petitioner presented abusive, successive and defaulted grounds for relief that challenge the lawfulness of the guilt phase of his bifurcated trial. To overcome these defenses, petitioner alleged he was "probably actually innocent."

I.

Petitioner's first question presented for review to this Court is whether the definition of "probable actual innocence" in Sawyer v. Whitley, 112 S.Ct. 2514 (1992) applies to abusive, successive and defaulted guilt phase issues. The Eighth Circuit Court of Appeals properly applied the Sawyer definition of "probable actual innocence". The Court of Appeals did not apply a new standard for guilt phase issues, but merely noted that the "colorable claim of factual innocence" standard of Kuhlmann v. Wilson, 477 U.S. 436, 454 (1986) was "more clearly delineated by the Supreme Court in Sawyer". Schlup v. Delo, 11 F.3d 738, 740 (8th Cir. 1993).

In Sawyer, this Court made it clear that the cause and actual prejudice test or the "probable actual innocence" test must

be met before a federal habeas corpus court can review the merits of a successive, abusive or defaulted claim. Sawyer v. Whitley, 112 S.Ct. at 2518. This Court discussed the "probable actual innocence" standard without distinction between guilt and penalty phase issues. Id. at 2518-2519. The Court even discussed the ease of applying the "probable actual innocence" concept in a guilt phase context. Id. at 2519-20. The court applied the "probable actual innocence" exception in Mr. Sawyer's case and found his allegation lacking as to both guilt and penalty phases. Id. at 2523-24. Indeed, the lack of distinction between guilt and penalty phase issues is understandable since this Court intends for the standards for federal habeas review to be applied consistently without distinction between abusive, successive, defaulted, or evidentiary-defaulted claims. Keeney v. Tamayo-Reyes, 112 S.Ct. 1715, 1720 (1992).

Although petitioner argues that Kuhlmann allows for a lower standard of proof to establish probable actual innocence of the underlying conviction then the Sawyer "probable actual innocence" of penalty phase issues, petitioner offers no policy reasons why guilt and penalty phase claims should be treated differently. Furthermore, the Kuhlmann standard can be applied consistently with the holding in Sawyer. See Sawyer v. Whitley, 112 S.Ct. at 2589 (discussing innocence standards).

Petitioner also contends that there is a split between the Eighth Circuit and the Fifth and Ninth Circuits on this issue. See Montoya v. Collins, 988 F.2d 11, 13 (5th Cir.), cert. denied, 113 S.Ct. 1630 (1993); Kirkpatrick v. Whitley, 992 F.2d

491 (5th Cir. 1993); Campbell v. Blodgett, 982 F.2d 1321, 1333 (9th Cir. 1992) (Petition at 15). Both Fifth and Ninth Circuit's opinion contained dicta and neither relied upon a distinction between the Kuhlmann and Sawyer language as a basis for granting or denying relief. Thus, petitioner fails to establish that there is a need to resolve an inter-circuit conflict. Supreme Court Rule 10.1.

Since the Court of Appeals' application of Sawyer to the underlying conviction was proper, petitioner's petition for writ of certiorari on this issue should be denied.

II.

Petitioner's second question presented for review is if Sawyer v. Whitley, 112 S.Ct. 2514 (1992) does define the "probable actual innocence" exception to review of defaulted, abusive and successive claims, does petitioner have to establish that the evidence of guilt presented at trial was constitutionally insufficient. Petitioner contends that if a habeas petitioner must establish that no rational trier of fact could have found the essential elements beyond a reasonable doubt, Jackson v. Virginia, 443 U.S. 307, 319 (1979), then no petitioner could ever establish probable actual innocence in a case, such as petitioner's, where the evidence of actual innocence merely impeaches the evidence presented at trial.

This issue is vital to petitioner's case where the petitioner does not present newly discovered evidence of actual innocence in his petition for writ of habeas corpus, but rather presents newly developed evidence of actual innocence consisting of affidavits from inmates who previously told investigators that they did not observe the murder. Since the state presented two eyewitnesses to the murder, the evidentiary sufficiency standard of Jackson has been met.

The panel opinion neither cites to, or relies on, Jackson in determining the issue.[2] Therefore, this is a false question

[2]Only the dissent from the denial of rehearing en banc cites Jackson. Schlup v. Delo, 11 F.3d 738, 755 (8th Cir. 1993).

for review since the panel opinion does not rely on Jackson in determining that petitioner failed to establish the "probable actual innocence" exception to review his defaulted, abusive and successive claims. Rather, the panel opinion applied Sawyer and looked at all the evidence presented before finding that petitioner did not meet the Sawyer standard.

Although the panel reviewed all the evidence in support of petitioner's claim of probable actual innocence, this Court rejected the presentation of additional mitigating evidence to establish "probable actual innocence" holding that such a broad inquiry would "make it anything but a 'narrow' exception". Sawyer v. Whitley, supra, 112 S.Ct. at 2522. Throughout the Sawyer opinion, this Court emphasized the narrowness of the exception. See id. at 2519, citing, Dugger v. Adams 489 U.S. 401 (1989) and McCleskey v. Zant, 111 S.Ct. 1454 (1991).

Because the panel's opinion did not rely on the Jackson, standard in determining that petitioner failed to establish the "probable actual innocence" exception to review his defaulted, abusive and successive claims, the question of whether petitioner must establish that the evidence of guilt presented at trial was constitutionally insufficient is not ripe for review by this Court. See Herrera v. Collins, 113 S.Ct. 853, 871 (1993) (O'Connor, J., concurring).

III.

Petitioner's third question presented for review is whether substantive due process of law requires the district court to grant an evidentiary hearing when a petitioner tenders newly discovered evidence of actual innocence to the court.[3]

Petitioner contends that an evidentiary hearing is required in the district court when a petitioner tenders a claim of newly discovered evidence of actual innocence. In Townsend v. Sain, 372 U.S. 293 (1963), this Court held that whether to hold an evidentiary hearing is left to the sound discretion of the district court. Id. at 313. In providing guidance to the courts, this court discussed six situations in which an evidentiary hearing in the district court would be required. Id. Although one of the situations requiring an evidentiary hearing was "a substantial allegation of newly discovered evidence" Id., this court noted that "[o]f course, such evidence must bear upon the constitutionality of the applicant's detention; the existence merely of newly discovered evidence relevant to the guilt of a state prisoner is not a ground for relief on federal habeas corpus." Id. at 317.

This holding was reaffirmed in Herrera v. Collins, 113 U.S. 853 (1993), which held that claims of actual innocence is not in

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[3]This Court noted that in the context of a Fourteenth Amendment claim, the question is not whether due process prohibits the execution of an innocent person, but whether due process entitles petitioner to judicial review of his actual innocence claim. Herrera v. Collins, 113 S.Ct. 853, 864, n. 6 (1993).

and of itself a constitutional claim but merely a gateway through which petitioner must pass to have his otherwise procedurally barred constitutional claim reviewed on the merits. Id. at 862. A petitioner who "does not seek excusal of a procedural error" is not entitled to habeas relief based on a claim of actual innocence. Id.[4] Any holding to the contrary would be barred under the implications of Teague v. Lane, 489 U.S. 288 (1989). Furthermore, this court held that the district court is not obligated to grant a hearing when the newly discovered evidence is frivolous or incredible. Townsend v. Sain, 372 U.S. at 317.

Petitioner has not shown that the district court abused its discretion in denying him an evidentiary hearing on his newly discovered evidence of actual innocence. Both the district court and the court of appeals addressed petitioner's allegation of newly discovered evidence of actual innocence. Both found that the affidavits submitted almost ten years after the murder consistent of statements inconsistent with previously sworn testimony given by the same witnesses and that witnesses in some cases were inconsistent with each other. This Court should defer to the careful review of petitioner's claim of actual inno-

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[4]Although petitioner contends that Herrera allowed for review of a truly persuasive claim of actual innocence, the Court's discussion on this issue was mere dicta. Furthermore, the court held that such a claim would only be reviewable if there was no state avenue in which to present the evidence of actual innocence. Id. 113 S.Ct. at 869. Petitioner admits that not only is a request for clemency available, but also that the Governor has stayed his execution and formed a Board of Inquiry to review his claim.

cence by the Court of Appeals; see Guinan v. Delo, 114 S.Ct. 296 (1993) (Ginsberg, J., concurring), and by the district court, see Delo v. Blair, 113 S.Ct. 2922, 2933 (1993). As this Court correctly noted in Herrera, the passage of time "only diminishes the reliability of criminal adjudication." Herrera v. Collins, 113 S.Ct. at 862.

As both the district court and the court of appeals noted, the testimony of the two eye witnesses has never been refuted. Nor has petitioner demonstrated that he has a justifiable reason for not previously presenting this information. Given that the affidavits submitted to the district court and to the court of appeals are contradictory to the affiant's previous statements and testimony, petitioner cannot demonstrate a justifiable reason for their eleventh hour presentation. Townsend v. Sain, 372 U.S. at 317. Since the district court was able to determine that the newly discovered evidence of actual innocence was not credible, the district court was not obligated to grant petitioner an evidentiary hearing on this matter. Id. Thus, petitioner's third question presented for review should be denied.

CONCLUSION

In view of the foregoing, respondent submits that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I am a member of the Bar of this Court, and that three true and correct copies of Respondent's Brief in Opposition to Petition for Writ of Certiorari in the case of Lloyd Eugene Schlup v. Paul Delo, No. 93-7901, was mailed pursuant to Supreme Court Rule 29.3, postage prepaid, this 4 day of March, 1994, to:

Sean O'Brien
5319 Rockhill
Kansas City, MO 64110

FRANK A. JUNG

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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C. Schlup v. Delo, No. 4:92000443, E.D. Mo., Order Dismissing Petition for Writ of Habeas Corpus (August 23, 1993).

D. Appellant's Factual Brief in Support of Innocence, Exhibit 1 to Application for Stay of Execution, U.S. No. 93-A-427.

E. Affidavit of former corrections officer Robert Faherty.

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 93-3272

Lloyd E. Schlup, *
*
Appellant, *
* Appeal from the United States
v. * District Court for the Eastern
* District of Missouri.
Paul K. Delo, *
*
Appellee. *

Submitted: November 3, 1993

Filed: November 15, 1993

Before JOHN R. GIBSON, Circuit Judge, HEANEY, Senior Circuit Judge, and BEAM, Circuit Judge.

BEAM, Circuit Judge.

Lloyd Eugene Schlup, a Missouri death-row inmate, requests a stay of execution and reversal of the district court's judgment denying his second petition for a writ of habeas corpus under 28 U.S.C. § 2254. The district court[1] dismissed Mr. Schlup's second petition on August 23, 1993, and denied his subsequent Fed. R. Civ. P. 59(e) motion to set aside the dismissal order. The district court's final ruling came on September 13, 1993, and Mr. Schlup's appeal and motion for a stay of execution pending the resolution of his appeal followed.

The district court dissolved its stay of execution on September 15, 1993, in conjunction with its final rulings on the second petition. After a hearing, we denied the motion for stay pending appeal. Schlup v. Delo, No. 93-3272, 1993 U.S. App. LEXIS 26748 (8th Cir. Oct. 15, 1993). We now vacate that opinion and consider a renewed request for stay and the merits of Mr. Schlup's appeal.

[1]The Honorable Jean C. Hamilton, United States District Judge for the Eastern District of Missouri.

In support of his second petition for habeas relief, this appeal, and the renewed request for stay of execution, Mr. Schlup tendered to the district court and now tenders to this court several affidavits and statements, mostly from present or former prisoners, purporting to be newly discovered evidence tending to establish that he was not present at the scene of the murder for which he was sentenced to death. He also renews his reliance on a videotape, offered at trial as part of an alibi defense, showing his presence in the dining room near the time of the murder. In other words, appellant says he could not have been present at the assault and is actually innocent of the crime.

I.

In his second petition, Mr. Schlup asserts a number of constitutional claims not raised, or raised and denied in his first petition. Thus, these allegations constitute either successive or abusive uses of the writ, 28 U.S.C. § 2244(b), and may be considered by this court only under limited circumstances. Sawyer v. Whitley, 112 S. Ct. 2514, 2518 (1992).

> Unless a habeas petitioner shows cause and prejudice, see Wainwright v. Sykes, 433 U.S. 72, (1977), a court may not reach the merits of: (a) successive claims which raise grounds identical to grounds heard and decided on the merits in a previous petition, Kuhlmann v. Wilson, 477 U.S. 436 (1986); (b) new claims, not previously raised which constitute an abuse of the writ, McCleskey v. Zant, 499 U.S. ___ (1991); or (c) procedurally defaulted claims in which the petitioner failed to follow applicable state procedural rules in raising the claims. Murray v. Carrier, 477 U.S. 478 (1986). These cases are premised on our concerns for the finality of state judgments of conviction, and the

"significant costs of federal habeas review." McCleskey, supra, at ___; see, e.g., Engle v. Isaac, 456 U.S. 107, 126-128 (1982).

Id. (parallel citations omitted).

Mr. Schlup seeks to establish "cause and prejudice" or, in the alternative, seeks to establish his "actual innocence" of the crime as a means of obtaining federal court review of his constitutional claims. The district court reviewed and denied his cause and prejudice allegations. We agree with this result and adopt the well-reasoned opinion of the district court in this regard.

II.

A. Procedural Bar

Under a second federal habeas review of a petitioner's state court conviction, a claim of actual innocence requires a dual analysis. First, we must consider Mr. Schlup's attempt to invoke the rule announced in Kuhlmann v. Wilson, 477 U.S. 436 (1986) that even if a petitioner cannot meet the cause and prejudice standard, a federal court may examine the merits of a constitutional claim if failure to do so would result in a miscarriage of justice. Id. at 454. A petitioner "may make the requisite showing by establishing that . . . he has a colorable claim of factual innocence." Id. The contours of this qualification were more clearly delineated by the Supreme Court in Sawyer v. Whitley, which referred to the test as the miscarriage of justice or "actual innocence" exception. Sawyer, 112 S. Ct. at 2519.

In this context, actual innocence is "not itself a constitutional claim, but instead a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits." Herrera v. Collins, 113 U.S. 853,

862 (1993). Thus, the question is: Has this appellant established "actual innocence" as defined by the Supreme Court? We think not, at least under the test this panel must apply.

Sawyer dealt with the punishment phase of the criminal proceeding as opposed to the guilt or innocence phase of the trial. Therefore, appellant argues, with some justification, that Sawyer announced only a test for analyzing the fairness of the death penalty portion of a trial. And, the Supreme Court did say, in Sawyer, with regard to guilt or innocence:

> Our standard for determining actual innocence was articulated in Kuhlmann as: "[T]he prisoner must 'show a fair probability that, in light of all the evidence, including that alleged to have been illegally admitted (but with due regard to any unreliability of it) and evidence tenably claimed to have been wrongly excluded or to have become available only after the trial, the trier of the facts would have entertained a reasonable doubt of his guilt.'"

Sawyer, 112 S. Ct. at 2519, n.5 (citations omitted).

On the other hand, Sawyer says that "actual innocence" under the death penalty phase of a case must be determined by considering whether a "petitioner has shown by clear and convincing evidence that but for constitutional error, no reasonable juror would find him eligible for the death penalty." Id. at 2523. Says appellant, this seemingly higher (penalty) test is necessary because the amorphous concept of being actually "innocent of death" requires a more objective standard. Id. at 2519-20. In other words, in the context of guilt or innocence of the crime itself, the concept of "actual innocence" is easier to grasp. Id. at 2520. Thus, the more subjective Kuhlmann test is sufficient.

Whatever the merits of appellant's contentions, we do not write on a clean slate. We must reject appellant's argument

because in this circuit "the new standard [required by Sawyer] applies equally to challenges to a conviction, not just challenges to a death sentence." McCoy v. Lockhart, 969 F.2d 649, 651 (8th Cir. 1992). And, the imprimatur of this court en banc was stamped on the McCoy holding in Cornell v. Nix, 976 F.2d 376 (8th Cir. 1992) (en banc), cert. denied, 113 S. Ct. 1820 (1993). Accordingly, we make our determination of whether Mr. Schlup's claim of actual innocence opens the gateway to our consideration of his constitutional claims on that basis.

Before reviewing the gateway evidence now advanced by Mr. Schlup, we consider the presence or absence of any constitutional error at the trial for which relief could be granted. The dissent contends that there was constitutional error in the form of "utter ineffectiveness of Schlup's trial counsel" and that but for this error "the jury would have received the full picture of Dade's murder, and if it were to credit the evidence, it would have no choice but to acquit." The dissent barely mentions that, although the district court found the claim of ineffective assistance to be procedurally barred, we disregarded this holding and considered the merits of this ineffective assistance claim in the appeal of Mr. Schlup's first petition for habeas relief. Schlup v. Armontrout, 941 F.2d 631, 638-42 (8th Cir. 1991), cert. denied, 112 S. Ct. 1273 (1992). We found that under the test announced in Strickland v. Washington, 466 U.S. 668, 687 (1984), Mr. Schlup's counsel was not ineffective at either the guilt or penalty stages of the state trial proceeding. Schlup, 941 F.2d at 639. We see no reason to change this result even if we consider the evidence Schlup now presents.

As at the first habeas, Mr. Schlup faults his counsel, Mr. Bushmann, for failing to sufficiently investigate the facts surrounding the murder of Arthur Dade. The dissent agrees. This allegation is erroneous and unfair.

There were three inmates involved in the murder. The three lawyers representing the accused worked together on parts of their investigations. Mr. Bushmann spearheaded the discovery and defense preparation. He arranged and participated in the taking of thirty-eight depositions including those of every guilt witness who testified at trial and who was directly related to the prison. It was Mr. Bushmann's persistence that confirmed the existence of the dining room videotape now used by Mr. Schlup in his effort to show actual innocence. Mr. Bushmann also determined through discovery that one hundred persons were interviewed by prison investigators and appears to have obtained, for review, the tapes or transcripts of all the statements resulting from these inquiries. The trials of the other inmates occurred prior to Mr. Schlup's trial and Mr. Bushmann claims to have reviewed the crucial portions of this trial testimony in preparation for Mr. Schlup's defense. The problem does not seem to be deficiencies in trial preparation by Mr. Bushmann but, rather, the changing nature of the information presented by some of the individuals present at or near the deadly assault.

At trial, as noted by the district court, two prison officials, who were eyewitnesses to the crime, positively identified Mr. Schlup as one of the three perpetrators of the murder. This evidence was clearly admissible and stands unrefuted except to the extent that Mr. Schlup now questions its credibility. Witnesses' credibility, however, is an issue reserved for the trial jury. It is not a matter within the province of the district court or of this court in a habeas proceeding. Federal habeas, as explained in Herrera, does not provide a forum for the retrial of a convicted felon. Herrera v. Collins, 113 S. Ct. 853, 860-61 (1993). So, even if we disregard the source of the new evidence, the eleventh-hour nature of the information, and a presentation coming almost six years after the trial; it is simply not possible to say that the appellant has shown by clear and convincing evidence that but for a constitutional error no reasonable jury

would have found him guilty. Therefore, there is no basis for sustaining the motion for stay, Delo v. Blair, 113 S. Ct. 2922 (1993), or for reversing the district court.

Even so, we will discuss the "newly discovered" evidence presented by Mr. Schlup. This information comes in the form of written statements, affidavits, and a timed analysis of the videotape taken in the dining room. We have now heard oral argument on these matters twice.

The major thrust of Mr. Schlup's purported showing of actual innocence involves his alibi defense. Through use of the videotape, timed on a second-by-second basis, Mr. Schlup claims that he could not have been at the murder scene. He was, he claims, in the dining room at the time.

Mr. Schlup primarily relies upon two affidavits, one from a former prisoner and one from a former employee at the institution.[2] The latter document is dated October 26, 1993, eight days before we heard oral argument on the merits of this appeal.

John L. Green, an inmate at the Missouri Prison in Jefferson City at the time of the murder, in an affidavit dated September 7, 1993, states that he was "standing near Sergeant Flowers" at the lever box that opens the cells to unit 5A and from such position saw the murder. He further says that Sergeant Flowers directed him to call "base" to report the fight and that he immediately went into the office and made the call.

In conjunction with this new information, the affidavit of Robert Faherty, a former lieutenant at the prison, is presented.

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[2]At oral argument, the state contended that the employee was discharged. The petitioner claims he retired. We find nothing in the record either way.

He places Mr. Schlup in his presence in a corridor to the dining hall for a two and a half to three-minute period as Mr. Schlup proceeded from housing unit 5A, the location of the murder, to the dining hall.

The videotape is then presented to show Mr. Schlup arriving at the dining hall first in line. According to the videotape, the corrections officers depart from the hall one minute and five seconds later, purportedly as a result of a call from "base" reporting the assault. This, Mr. Schlup contends, shows that he had left the housing unit before the assault occurred. Since Mr. Schlup arrived, according to Mr. Faherty's calculation, at least three and a half to four minutes after leaving the housing unit, and, the assault occurred, according to Mr. Green's statement and the videotape, one and a half to two minutes prior to his arrival at the dining room, Mr. Schlup has an alibi. This was the same defense Mr. Bushmann attempted to establish at trial.

However, Mr. Green has made two prior statements. He told prison investigators that on February 3, 1984, the day of the murder, he was in the office at the housing unit, not next to Sergeant Flowers at the lever box some distance away, and that he did not observe the murder at all. He did state that he called "base" for help but on a different timing sequence. Of more importance is Mr. Green's testimony under oath at the Rodnie Stewart trial. Mr. Stewart was accused, along with Mr. Schlup and Mr. O'Neal, of the crime and was tried over a year prior to Mr. Schlup. On September 5, 1984, Mr. Green testified under oath that he was in the office, heard the words "fight-fight," "got up and . . . went to the door [of the office]," could see Sergeant Flowers at the lever box, saw Dade running toward the office when Dade and Stewart collided and fell to the floor. Mr. Green said he saw no actual fight take place. He then testified that he went into the office to wait for further instructions. He made no mention in his testimony of calling "base." Thus, neither of these earlier

presentations fully support Mr. Green's present statement. Indeed, there are crucial differences.

Also, Mr. Faherty has testified under oath on two prior occasions. His deposition was taken by Mr. Bushmann and the lawyers for Mr. O'Neal and Mr. Stewart on June 29, 1984, and he testified at Mr. Schlup's December 1985 trial. In both instances, Mr. Faherty has Mr. Schlup yelling out a window near the corridor to the dining room and then passing with the "first wave" of prisoners immediately into the dining room. Specifically, Mr. Faherty testified that he was temporarily on post at door T-3 located at the end of the corridor leading from the housing unit to the dining hall for only ten to fifteen seconds. At this location and during this time period, he saw Mr. Schlup yell out the window and told Mr. Schlup to move along toward the dining room which "he [Schlup] did." Mr. Faherty testified that he also immediately moved to the dining room after his ten to fifteen second stop at T-3 because the dining room was really his assigned post. By all accounts, the walking time from T-3 to the entrance of the dining room is no more than twenty-five to thirty seconds.

Also of importance, in this context, is the testimony of Sergeant Peoples who was manning "base" during the relevant time period. He testified without equivocation that it was Captain Eberle, one of the officers posted near the scene of the murder, and not prisoner Green, who called "base" with news of the stabbing. Peoples testified that he immediately broadcast an alarm to prison officers, including those in the dining room who are seen responding to the call on the videotape.

Thus, in the record and in the discovery, a much different timing sequence is established, one that provided Mr. Schlup ample time to participate in the murder and make his way to the dining hall. This was, of course, the state's theory at the trial and a theory compatible with the jury verdict.

With the recent Faherty statement, we are asked on appeal to consider evidence that the district court did not have an opportunity to pass upon. Further, Mr. Faherty testified in Mr. Schlup's trial, as indicated, so it cannot be said that his affidavit is newly discovered evidence as were the affidavits considered in Herrera. We must also observe that in a civil context dealing with a motion for summary judgment, we have held that we will not allow an affidavit in conflict with earlier sworn testimony to create an issue of fact. Camfield Tires, Inc. v. Michelin Tire Corp., 719 F.2d 1361 (8th Cir. 1983). We believe that the same rule should apply in the context of habeas litigation, a civil action.

While it is evident that there are some inconsistencies between Mr. Faherty's affidavit and his trial testimony, for the most part, the affidavit simply is an effort to embellish and expand upon his testimony given under oath in Mr. Schlup's trial. This is not the type of newly discovered evidence contemplated in Herrera, and presents an entirely different issue of whether some seven years after a trial the court should permit witnesses to come in and add to, modify, or embellish their earlier testimony. We believe that a habeas court should not permit retrial on such a basis.

The dissent also emphasizes other parts of Mr. Schlup's present version of the facts in its attempt to advance the probability that, but for his attorney's incompetence, no reasonable jury would have found Mr. Schlup guilty of the murder. Mr. Schlup purports to present eyewitnesses who either didn't see him at the assault or who now implicate another inmate, Randy Jordan.

The dissent picks and chooses from among Mr. Schlup's several new statements and affidavits, see dissent n.1, and finds some of them incredible because they "are too inconsistent with" the

statements from some of the other newly presented eyewitnesses. The dissent also ignores or minimizes and excuses contrary statements given by some of these same individuals when the crime was investigated prior to trial. Indeed, three of the new statements credited by the dissent, in addition to the Green affidavit, those by Lamont Griffin-Bey, Donnell White and James Pierce, are inconsistent with prior interviews given during the investigation of the crime. At that time, White and Pierce denied having witnessed the murder at all. As the dissent concedes, Griffin-Bey, who now identifies Robert O'Neal and Rodnie Stewart and finds Mr. Schlup absent from the attack, stated at the time of the contemporaneous investigation that he didn't "know none of those dudes." And, later, he refused to further comment on what happened at the time of the murder.

Thus, Mr. Schlup, like Herrera, attempts to seek a federal court retrial of his state court prosecution and falls well short of showing "by clear and convincing evidence [that] no reasonable juror would find him [guilty of murder.]" Sawyer, 112 S. Ct. at 2523.

B. Due Process

The second prong of Mr. Schlup's "actual innocence" allegation requires our consideration of the claim as, itself, a constitutional violation. This requirement arises from the assumption by the Supreme Court in Herrera made for the sake of deciding that particular case, "that in a capital case a truly persuasive demonstration of 'actual innocence' made after trial would render the execution of a defendant unconstitutional, and warrant federal habeas relief if there were no state avenue open to process such a claim." Herrera, 113 S. Ct. at 869. This language is from Justice Rehnquist's opinion concurred in by Justices Scalia and Thomas. Justice O'Connor in her concurrence, joined by Justice Kennedy, compared and contrasted this language with that from

Justice White's concurrence and Justice Blackmun's dissent, and stated that resolution of this issue assumed by Justice Rehnquist was neither necessary nor advisable in this case. She emphasized that such "federal proceedings and relief--if they are to be had at all--are reserved for 'extraordinarily high' and 'truly persuasive demonstrations of "actual innocence"' that cannot be presented to state authorities." Id. at 874.[3] The decisive issue in her concurrence as well as in Justice Rehnquist's opinion, was that the petitioner had failed to make a persuasive showing of actual innocence. Justice Rehnquist stated that the showing fell short of that which would have to be made to trigger the constitutional claim which he assumed existed.

Herrera points to the resolution of Schlup's claim. As we have just discussed in part II-A, when the new evidence itself is analyzed with its inconsistencies and weaknesses, and considered together with the evidence before the jury at the trial of the case, the extraordinarily high burden is not met, and there is no truly persuasive demonstration of actual innocence.

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[3]As the author of this opinion for the court, I express, separately, without the concurrence of Judge John R. Gibson, my belief that Mr. Schlup cannot, under the holding in Herrera, seek federal habeas relief based upon this "free standing" claim without first seeking executive clemency from the Governor of Missouri. It is my view that in Herrera, at least five members of the Supreme Court (Chief Justice Rehnquist, Justices O'Connor, Kennedy, Scalia, and Thomas) would permit a federal habeas remedy based upon an "actual innocence" claim arising from newly discovered evidence rather than trial error (assuming such a remedy even exists when the question reserved for future consideration is answered) only "if there were no state avenue open to process such a claim." Herrera, 113 S. Ct. at 869, 874. While Schlup argues that the word "process" included in the Herrera formulation by the five member majority means a state court proceeding, such an interpretation is untenable given the extensive discussion of executive clemency in both the opinion of the Court authored by Chief Justice Rehnquist and the concurrence written by Justice O'Connor. Indeed, Justice O'Connor, in her discussion of the "assume[d]" constitutional right, points out that the reserved question "may never require resolution at all" if "the safeguards of clemency and pardon fulfill their historical mission." Id. at 874.

III.

For the reasons stated above, we conclude that the motion for stay of execution should be denied and the order of the district court affirmed.

HEANEY, Senior Circuit Judge, dissenting.

Lloyd Eugene Schlup has presented truly persuasive evidence that he is actually innocent of the murder of his fellow inmate Arthur "Stump" Dade. Five eyewitnesses to the murder have provided sworn testimony that Schlup neither participated in the murder nor was present at the time. Both Schlup and his mother begged trial counsel (and subsequent counsel) to interview inmates housed in cells near the site of the murder, but none did so. Consequently their testimony was not heard by the jury that convicted Schlup and sentenced him to death. Moreover, their testimony has not been heard in open court since the trial because neither the Missouri courts nor the federal courts have been willing to grant Schlup an evidentiary hearing in which this new evidence could be heard and evaluated. This truly persuasive evidence of his innocence allows Schlup to clear the court-imposed procedural hurdles and to address the merits of his claim that trial counsel was ineffective for failing to interview these eyewitnesses. The court errs today in not remanding this matter for an evidentiary hearing, as it did in ruling on Schlup's first petition, and I must therefore dissent.

I

Schlup presents new evidence of his actual innocence of Dade's murder that is truly persuasive. The new evidence falls primarily into two categories. First, and most important, are the affidavits of eyewitnesses to Dade's murder which state unequivocally that Schlup was not present at and did not participate in Dade's murder. Second, Schlup presents new evidence that substantiates his

videotaped alibi, i.e., that he was in the dining room at the time of the murder.

A

Schlup presents five affidavits of eyewitnesses to the murder, none of whom were contacted by Schlup's defense counsel, none of whom testified at trial, and all of whom appear willing to give their testimony in open court.[1] These witnesses describe firsthand the murder of "Stump" Dade, indicating unequivocally that Lloyd Schlup was not a perpetrator and was not even present. This testimony not only satisfies the threshold question of "actual innocence" but persuasively demonstrates the utter ineffectiveness of Schlup's trial counsel in failing to investigate the circumstances of Dade's murder.

John Green testifies by affidavit that while standing outside the unit clerk's office the morning of February 3, 1984, he witnessed Dade's murder:

> I looked down one walk, and I saw Randy Jordan holding Arthur Dade. Jordan was standing behind Dade, and had Dade's arms pinned to his sides from behind. I saw Robert O'Neal stab Dade several times in the chest while Jordan was holding him.
>
> * * *
>
> I never saw Lloyd Schlup at the scene of the crime. . . .
>
> * * *

[1]A number of other persons who stated that they were eyewitnesses to Dade's murder submitted affidavits or sworn testimony indicating that Schlup was not present at the time the murder occurred. I have not placed significant reliance on these statements either because the affiants indicate an unwillingness to testify at an evidentiary hearing or because the statements are too inconsistent with the statements of all of the other eyewitnesses (those newly presented by Schlup and those of the prosecution).

> If I had been contacted before Schlup's trial, I would have told his attorney that he was not there when Dade was stabbed . . . .

Affidavit of John L. Green, at 2, 4, 6 (Sept. 7, 1993). O'Neal has been convicted for his role in Dade's murder, as has Rodnie Stewart, whom Green also saw on "one walk" at the time. Green has been out of prison since 1986, so contrary to the state's assertion he does have something to lose by perjuring himself. He nonetheless comes forward with persuasive evidence of Schlup's innocence, evidence never heard by the jury that sentenced Schlup to death, and he deserves to be heard in open court.[2]

Donnell White was walking to the dining room "very close to" "Stump" Dade when "three white guys" came from the opposite direction:

> One of them had a tumbler of something that he threw in Stump's face. One or two of the other ones started sticking Stump with an ice-pick-type knife. They both jumped him, but I could tell for sure that one guy was stabbing him, and I'm not sure about the other guy. One broke off to the kitchen, and the other threw the knife out the window. The guy who threw the liquid in his face just backed off. The liquid was steaming, and I could smell bleach, so I think it was a mixture of bleach and boiling water. . . . I have seen Lloyd Schlup, and I know who he is. He is definitely not one of the guys I saw jump Arthur Dade, who I knew as "Stump." I know that one of the three men involved has never been prosecuted, and I know that Lloyd Schlup is innocent.

[2]The state argues that Green's latest affidavit is inconsistent with his testimony in the trial of Rodnie Stewart. Green then indicated that he had not seen the stabbing itself. While this inconsistency would need to be explored on remand, I believe it is fairly easily explained. Green was at that time still in prison and justifiably afraid for his well-being. See infra n.11. It was probably in his interest to say that he had arrived just after the stabbing as he then indicated. Now that he has been out of prison for seven years, he no longer is afraid to let the truth be known.

Affidavit of Donnell D. White, at 2, 3 (Apr. 21, 1993) (emphasis added). White describes "the third guy" as "a white guy with tatoos [sic] all over his arms." Id. at 2. Lieutenant Faherty indicates that Randy Jordan was "covered" with tattoos. Affidavit of Robert Faherty, at ¶ 7 (Oct. 26, 1993). White's testimony is otherwise consistent with that of the prosecution: Rodnie Stewart was convicted for his role in Dade's murder, which consisted at least in part of throwing a cup of liquid in Dade's face. See State v. Stewart, 714 S.W.2d 724, 725-26 (Mo. Ct. App. 1986).

Joseph Beck also attests to Schlup's innocence: "I witnessed the knifing of Arthur 'Stump' Dade. It happened immediately in front of my cell, 3-3½ feet away. Lloyd Schlup was not in sight, not even on the flag, where stabbing took place. Never saw Schlup." Affidavit of Joseph N. Beck (Feb. 5, 1992).

James Pierce was waiting for his friend Wardell Harvey to accompany him to lunch when he witnessed Dade's murder: "I saw two white guys go onto 1-walk. One of them threw a cup of liquid in Arthur Dade's face, and the other one stabbed him. Lloyd Schlup was not involved in the stabbing." Affidavit of James Pierce, at 1 (Apr. 21, 1993). Dade was a black man, and his murder may have been racially motivated. Those involved were alleged to be members of a white supremacist group in the prison. Pierce is also black and adds the following: "I have no reason to lie for a white guy. . . . I know for certain that Lloyd Schlup did not kill Arthur Dade, and that he was not even present when Dade was killed." Id. at 2.

LaMont Griffin-Bey was also on his way to lunch when he witnessed Dade's murder: "The first thing I saw of the fight was Rodney Stewart throw liquid in Arthur Dade's face, and O'Neal stab him. . . . Lloyd Schlup was not present at the scene of the fight." Affidavit of LaMont Griffin-Bey, at 2-3 (Apr. 7, 1993). Griffin-Bey made contemporaneous statements consistent with this

affidavit. He told prison investigators that he "saw one man throw some water in his face. And when he went down the other man started hitting him with a knife." Excerpt of Transcript of Inmate Interviews, Exhibit 1A in Support of Petition for Writ of Habeas Corpus (interview of LaMont Griffin-Bey).

Although he failed at that time to identify either of Dade's assailants (stating initially that he "don't know none of those dudes" and later stating an unwillingness to comment on that because "this is too serious for me"), Griffin-Bey did indicate that of the two, "Sgt. Flowers grabbed one" and the other got away. Id. It is uncontroverted that Sergeant Flowers detained Stewart at the scene of the murder and that O'Neal ran to the dining room. An earlier affidavit by Griffin-Bey also supports his most recent statement: "I witnessed the knifing of Arthur Dade on [February 3, 1984]. I saw two men and the victim involved in the knifing. I did not see Lloyd Schlup around the area and I was standing approximately 10 ft. away from where the incident happened." Affidavit of LaMont Griffin-Bey (Jan. 21, 1992).

Each of these five eyewitnesses[3] was available to be

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[3]One additional eyewitness merits mention. According to the transcript of the inmate interviews conducted by prison investigator George Brooks, inmate Ricky McCoy asserted both that there was a "crowd of people" (indicating a generous supply of eyewitnesses to be interviewed by Schlup's trial counsel) and that "[t]here was just only two [perpetrators]. No doubt about it." He then identifies "Neal" as the man who stabbed Dade and a photo of Stewart as the man who threw the cup of water. Excerpt of Transcript of Inmate Interviews, Exhibit 2 in Support of Petition for Writ of Habeas Corpus (interview of Ricky McCoy).

The panel opinion denying Schlup's initial appeal states that although Schlup's trial counsel reviewed the statements made by Griffin-Bey and McCoy, he decided that their "testimony would be repetitive of the testimony to be presented at trial." Schlup, 941 F.2d at 639. Given that trial counsel presented no eyewitnesses to the murder, it eludes me how their testimony could reasonably be considered repetitive.

interviewed by trial counsel had he simply noticed their depositions while he was at the prison to depose those on the prosecution's list, yet this was not done. The district court determined it was unnecessary to hear these witnesses in open court, apparently because there is "something suspect about affidavits produced after a long delay" and the "affiants are all fellow inmates who do not necessarily have a strong incentive to refrain from perjuring themselves." Schlup v. Delo, No. 4:92CV00443, slip op. at 12 (E.D. Mo. Aug. 23, 1993). Of course, not all the affiants are currently fellow prisoners, as noted above,[4] but the district court's reasoning is unpersuasive in any event, given the facts of this case. The murder for which Schlup has been convicted occurred in prison. It follows that the eyewitnesses (other than the prison guards) would be fellow prisoners. These affidavits were not presented earlier because Schlup's trial counsel (and earlier post-conviction counsel) never interviewed his fellow inmates, at least two of whose statements to prison investigators revealed their status as eyewitnesses. In addition, Lieutenant Faherty indicates in his affidavit that several of these prisoners, particularly John Green and Joseph Beck, are reliable witnesses, unlike many prisoners. Affidavit of Robert Faherty, at ¶ 7 (Oct. 26, 1993). Essentially what the district court and implicitly this court require is that one wrongly convicted of a murder in prison present innocents as

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The record now before us reveals that Schlup's counsel did depose McCoy and that McCoy denied having witnessed the incident. Deposition of Ricky McCoy (June 26, 1984). No one asked McCoy about his prior statement that he had witnessed the murder. Under the circumstances counsel was required to compel McCoy's testimony. See infra at ___.

[4]John Green's affidavit was not part of the record before the trial court, nor was the transcript of his testimony in Rodnie Stewart's trial. The record has expanded repeatedly before our court at the request of both the parties and the court. Lieutenant Robert Faherty's affidavit has been added, as have the thirty-nine depositions (of thirty-eight individuals) taken from the prosecutor's files.

eyewitnesses and be able to afford competent counsel from the beginning. Schlup could, of course, do neither. Rather than discount these eyewitnesses' statements sight unseen, the district court should have granted Schlup the evidentiary hearing he requested, and then these witnesses could be subject to examination by the state and their credibility could be accurately determined.

The state argues that Schlup's counsel was effective and notes specifically that he deposed thirty-eight witnesses. These depositions were done collectively by Schlup's, Stewart's, and O'Neal's attorneys, in the presence of the prosecutor, over a period extending from June 26 to July 10, 1984. Of the thirty-eight witnesses, fourteen were inmates and the remaining twenty-four were either prison personnel or other law enforcement officers. Eight of the fourteen inmates refused to answer questions, and some of them relied on the Fifth Amendment.

Other inmates were discussed during the deposition of corrections officer George Brooks, who indicated that he had interviewed all of the inmates on walks one through four and that none of these inmates had any knowledge of the incident. Deposition of George Brooks, at 9 (July 2, 1984). Schlup's counsel apparently accepted this testimony as fact and failed to interview the inmates on these walks.[5] This is ample evidence of his

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[5]No evidence in the record supports the majority's assertion that Schlup's trial counsel "arranged" for the taking of these thirty-eight depositions. It appears that the only witnesses deposed were those proffered by the state. If it is true, as the majority suggests, that trial counsel read the statements of the one hundred inmates on walks one through four, he has even less excuse for failing to interview individually Griffin-Bey and McCoy, who both told prison investigators that they had witnesses Dade's murder. Regardless of whether he read the statements, he was obligated to interview these potential eyewitnesses individually. His failure to do so is the essence of Schlup's claim of ineffective assistance. Lest the point be lost in the majority's recitation of what trial counsel did do, let me repeat: at no point before, during, or after trial did Schlup's counsel interview

ineffectiveness, but he was further ineffective in accepting inmates' statements that they would not testify because they had taken the Fifth Amendment.

Our court set the standard for attorney competence in investigating witnesses and compelling their testimony in Eldridge v. Atkins, 665 F.2d 228, 235 (8th Cir. 1981), cert. denied, 456 U.S. 910 (1982):

> When a man's liberty is at stake counsel owes a greater duty than to simply accept someone's hearsay statement that the witness would rather not testify. A lawyer's duty to defend rises to a greater measure of responsibility. A competent lawyer's duty is to utilize every voluntary effort to persuade a witness who possesses material facts and knowledge of an event to testify and then, if unsuccessful, to subpoena him to court in order to allow the judge to use his power to persuade the witness to present material evidence.

Competent counsel are required, as indicated above, to use every means necessary to persuade these witnesses to present material evidence. A witness who pleads the Fifth Amendment

> is not exonerated from answering merely because he declares that in so doing he would incriminate himself — his say-so does not of itself establish the hazard of incrimination. It is for the court to say whether his silence is justified, and to require him to answer if "it clearly appears to the court that he is mistaken."

Hoffman v. United States, 341 U.S. 479, 486 (1951) (citations omitted). Schlup's counsel did not give the court that opportunity. He did not interview eyewitnesses to the murder who would have testified that Schlup was not present and did not participate, and he did not compel the testimony of those who

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any of the one hundred potential eyewitnesses made known to him by the state. In this his representation fell below the level required by the Sixth Amendment.

refused to testify. His performance violated Schlup's constitutionally protected right to counsel.

B

In addition to the eyewitness testimony discussed above, Schlup also presents this court with new evidence in support of the alibi defense he presented at trial. That defense consisted of the testimony of several prisoners that Schlup had walked ahead of them to the dining room, the testimony of Lieutenant Faherty that he had spoken to Schlup outside the dining room, and the videotape that shows Schlup as the first inmate to arrive in the dining room.

The importance of the videotape is in the time lapse between when Schlup arrived, when the guards received a call over their radios about the attack on Dade, and when O'Neal and Jordan arrived. No one disputes that Schlup was first in line for lunch on February 3, 1984. The surveillance videotape of the dining room confirms this fact. According to the videotape, one minute and five seconds elapsed from Schlup's entrance into the dining room until the guards received a radio call about the fight. Twenty-six seconds after the guards responded to the radio call O'Neal ran into the dining room dripping blood. Prison investigator George Brooks testified at trial that one could run from the scene of the crime to the dining room in just over thirty seconds, with a brisk walk taking over a minute.

At trial it was believed that the radio call to which the dining room guards can be seen responding was made several minutes after the stabbing had occurred. Captain Eberle testified that he had radioed for help when he first arrived on the scene, which was several minutes after the stabbing. This would arguably have given Schlup time, as the state asserted in its closing arguments, to get to the dining room one minute before the call went out over the radio.

Schlup presents new evidence on this point, however, evidence that apparently was available at the time of trial but was not presented to the jury due to the ineffectiveness of Schlup's trial counsel. John Green, the eyewitness whose testimony is discussed above, did more than simply watch the stabbing on February 3. Sergeant Flowers called out for someone to call the base, and Green did just that. He told the prison investigators about this phone call when he was first interviewed: "I heard Sgt. Flowers calling for officers cause they had had a fight. Couldn't get nobody so he told me to call base to notify them of the fight and that's what I did." Excerpt of Transcript of Inmate Interviews, Exhibit 4A in Support of Petition for Writ of Habeas Corpus (interview of John Green). This phone call took place just after he saw "inmate Dade fall right there in front of the office." Id.

Green's affidavit provides greater detail: "When I called base, it was within seconds of Dade hitting the ground. It could not have been more than a half minute or a minute after he was stabbed by Jordan and O'Neal. It happened very fast." Affidavit of John L. Green, at 4 (Sept. 7, 1993).[6]

Lieutenant Faherty has also expanded on his earlier trial and deposition testimony. He testifies that he was on duty at T-3, a door about halfway between Schlup's cell and the dining room that is kept locked except when inmates are moving from one place to

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[6]Sergeant Peoples, who was the dispatcher at base control at the time of the stabbing, indicated that he had been called by Captain Eberle. Deposition of Ellis R. Peoples, at 9-10 (July 5, 1984). He was not asked about John Green or whether any inmate had called in the fight. He did testify that he kept a log of this incident, and Lieutenant Faherty likewise testified in his deposition of the existence of certain logs. None of these appear in the record, and there is no evidence that they were ever examined by Schlup's trial counsel. One of the difficulties in this case is ascertaining absolute times (it all occurred "about noon"), and these logs would seem to be useful in this regard. The absence of these logs is but further evidence of the ineffectiveness of Schlup's trial counsel.

another. When T-3 was opened from base control at his direction, he saw Schlup "coming down the corridor . . . . He was walking a leisurely pace with his hands in his pockets." Affidavit of Robert Faherty, at ¶ 4 (Oct. 26, 1993). Schlup stopped at a window to yell at someone outside, Faherty reprimanded him, and Schlup walked to T-3. Faherty "patted him down, and he went to the dining room. [Schlup] was not perspiring or breathing hard, and he was not nervous." Id. Faherty was relieved from T-3 shortly after Schlup passed through, and Faherty then went to the dining room. He estimates that Schlup was in his presence (presumably from the corridor the other side of T-3 and into the dining room) for two-and-a-half to three minutes. It would take Schlup another thirty seconds to walk from his cell to where he first entered Faherty's line of sight. Id. at ¶ 6. Counting the minute in the dining room prior to the radio call (when he was presumably in Faherty's presence as well), Schlup left his walk at least three to three-and-a-half minutes before the radio call.[7] If the radio call came in response to John Green's phone call, it is impossible, as Faherty asserts, for Schlup to have participated in Dade's murder.

Given the timing of this call for help and the evidence presented at trial (the videotape, the testimony of Lieutenant Faherty, and the testimony of Brooks on how long it takes to move from the scene of the crime to the dining room), it is not possible that Schlup could have participated in Dade's murder and been in the dining room as the videotape indicates. In short, Lloyd Schlup could not have been in two places at the same time. O'Neal arrived nearly thirty seconds after the radio call, and the prosecution's

[7]Faherty indicates in his affidavit that it must have been five to five-and-a-half minutes from the time Schlup left his cell to the time of the radio call. This is somewhat inconsistent with the details of both his affidavit and his earlier trial testimony and deposition. Any inconsistency should be explored, and perhaps explained, at an evidentiary hearing. One need only rely on the most conservative estimate of a three-minute lapse to conclude that Schlup could not have participated in Dade's murder.

testimony establishes that he took off at a run. He was followed into the dining room by Randy Jordan. Rodnie Stewart had already been detained. Meanwhile, as Schlup has maintained since the beginning, he was simply in the dining room eating his fish sandwich.

II

Despite the weight of this new evidence, the court refuses to reach the merits of Schlup's claim that his counsel was ineffective by declaring the issue subject to procedural bar. The procedural hurdles habeas petitioners must clear stem from two sorts of concerns. First, we wish to insure that state courts are given an opportunity to review such claims before we will review them ourselves, and second, we fear that late-blooming claims of error that could have been raised earlier are little more than dilatory tactics by petitioner's counsel. Neither concern is implicated in this case because Schlup has asserted since the beginning that his trial counsel was ineffective for failing to interview eyewitnesses to Dade's murder.

A

Schlup was convicted on December 11, 1985, after a two-day trial.[8] His conviction was affirmed on February 17, 1987, by the Missouri Supreme Court and the United States Supreme Court denied certiorari on June 8 of that year. See State v. Schlup, 724 S.W.2d

[8]The state asserted at oral argument that we should not "retry" this case on habeas and asked what we would tell the jury that sat through this two-week or three-week long trial, implying that we would somehow be showing disrespect to the jury if we found that Schlup deserved a new trial because of trial counsel's failure to present that very jury with exculpatory witnesses. I repeat that Schlup received only a two-day trial. Had trial counsel presented the exculpatory eyewitnesses now presented, the jury would have received the full picture of Dade's murder, and if it were to credit the new evidence, it would have no choice but to acquit.

236 (Mo.), cert. denied, 482 U.S. 920 (1987). Less than six weeks later Schlup filed for post-conviction relief in the Missouri courts under Rule 27.26 as it then existed. This was the first opportunity that Schlup had to raise the ineffectiveness of his trial counsel because no record had been made which would allow the issue to be raised on direct appeal. Schlup raised the issue loudly and clearly, alleging that his trial counsel was constitutionally ineffective in that he "failed to interview witnesses in support of [his] defense including Robert O'Neal, Van Robinson, Lamont Griffin and Ricky McCoy, who were witnesses to the crime of which Petitioner was convicted, and who would have testified that Petitioner was not one of the three inmates involved." Rule 27.26 Motion at 2, Schlup v. State, No. CV187-3457CC (Circuit Court of St. Charles County, Mo., filed July 18, 1987). Schlup also alleged that his "counsel failed to investigate Petitioner's alibi defense and failed to interview Randy Jordan, who Petitioner believes was in fact the third participant in the murder of which Petitioner was convicted." Id. at 3.

An evidentiary hearing was held at which Schlup's trial counsel testified, and the motion court ruled against Schlup, finding that his trial counsel had been effective. See Schlup v. State, No. CV187-3457CC (Circuit Court of St. Charles County, Mo., Nov. 6, 1987). The court accepted trial counsel's testimony, and found that the witnesses who were not interviewed were either not made known to trial counsel by Schlup or "were known not to have information which would assist the defense." Id. at 4.

Schlup appealed this adverse decision, specifically alleging that trial counsel was ineffective for not interviewing the aforementioned witnesses. Appellant's Brief at 4, Schlup v. State, 758 S.W.2d 715 (Mo. 1988) (No. 70694). The Supreme Court of Missouri ignored this issue when it affirmed the motion court's decision. See Schlup v. State, 758 S.W.2d 715 (Mo. 1988) (en banc).

Schlup then raised the issue in his pro se petition for federal habeas filed in the Eastern District of Missouri. His handwritten petition alleges that trial counsel "[d]id not interview inmate John Green; who was the inmate 'clerk' and gave statement to investigators that he put out the phone call to base control." His amended petition prepared by counsel restated the language of the 27.26 motion, alleging that "Petitioner's trial counsel . . . failed to interview witnesses in support of [the] defense including Robert O'Neal, Van Robinson, Lamont Griffin and Ricky McCoy, who were witnesses to the crime of which petitioner was convicted, and who would have testified that Petitioner was not one of the three inmates involved." First Amended Petition, Attachment to 11(a)(3) at 1 (¶ A(1)), Schlup v. Armontrout, No. 89-0020C(3) (E.D. Mo. filed March 7, 1989). Schlup also alleged ineffectiveness of trial counsel for failure to call "those persons who would have testified that Petitioner was not the third inmate involved in the murder of which he was convicted" including the aforementioned. Id. at 2 (¶ A(5)). Counsel raised this issue in the briefs filed with the district court as well. See Petitioner's Brief at 9-10, Schlup v. Armontrout, No. 89-0020C(3) (E.D. Mo. May 31, 1989).

The district court ruled summarily and without any basis that the claims raised in paragraphs A(1) and A(5), along with others, were "barred from further consideration" because of Schlup's "failure to assert them at trial, to include them in his motion for new trial, to brief them on appeal, or to pursue them in [his] post-conviction proceedings." Schlup v. Armontrout, No. 89-0020C(3), slip op. at 6 (E.D. Mo. May 31, 1989), aff'd, 941 F.2d 1062 (8th Cir. 1991), cert. denied, 112 U.S. 1273 (1992).

Schlup appealed to our court, again arguing that trial counsel had been ineffective for "fail[ing] to investigate and call witnesses, including alibi witnesses, in petitioner's case in chief." Appellant's Brief at 18, Schlup v. Armontrout, 941 F.2d

1062 (8th Cir. 1991) (No. 90-1164EM). Rather than remand the matter to the district court so that it could make the initial determination on the merits (and perhaps conduct the evidentiary hearing that Schlup has never had in federal court), we addressed the merits of his claims and found them wanting.

Had we fully explored the alleged procedural default, we would have found it to be nonexistent. Schlup raised the issue to the Circuit Court of St. Charles County, Missouri, and to the Supreme Court of Missouri, but because the Missouri Supreme Court failed to address the issue the district court ruled that Schlup had failed to raise it in that forum. The Missouri Supreme Court's error was attributed to Schlup, and our ruling only compounded the injustice.

B

We erred in not remanding the case to the district court two years ago. Had we done so, his present counsel, who was appointed immediately following our prior ruling and who is the only truly competent counsel to have represented Schlup since the beginning, would have had an opportunity to develop the record we now have before us and this claim could have been addressed on the merits by the district court as it should have been in the first place.

The only procedural hurdle that remains in Schlup's path is our affirmance of the district court's error in failing to address this claim when it was first presented. There are two routes around this procedural bar. The route pursued in the briefs is the actual innocence or fundamental miscarriage of justice exception to bar, but that exception normally is pursued when the failure to raise the claim earlier can be traced to the petitioner. In this case the fault lies with the federal courts, and the second route around this bar can be remedied most sensibly by this federal court. Justice requires that we correct our prior decision, which we can do by recalling the mandate and remanding the initial

petition to the district court for an evidentiary hearing on the merits of the ineffective assistance claim. Recall of the mandate is authorized "to prevent injustice," 8th Cir. R. 41A, and we have done so in the death penalty context in the past. See Simmons v. Lockhart, 856 F.2d 1144 (8th Cir. 1988). Schlup has asserted that trial counsel was ineffective for failing to interview eyewitnesses since the beginning, and it is time that his evidence to support that claim be heard in open court.

III

If we do not recall our prior mandate, Schlup's claims are barred as either successive, abusive, or procedurally defaulted, see Sawyer v. Whitley, 112 S. Ct. 2514, 2518 (1992), but exceptions must be made if a petitioner adequately asserts either cause and prejudice or a fundamental miscarriage of justice, which is also known as the "actual innocence" exception. See id. at 2518-19. If the evidence Schlup has presented were to stand up in an evidentiary hearing, it would satisfy the actual innocence standard, and we should therefore address the merits of his claim that his counsel was constitutionally ineffective during the guilt phase of his trial. See Strickland v. Washington, 466 U.S. 668 (1984).

A

Under the Supreme Court's decisions on actual innocence, the standard to be applied in this case is stated in Kuhlmann v. Wilson, 477 U.S. 436 (1986), in which Justice Powell stated the requirement that

> the prisoner must "show a fair probability that, in light of all the evidence, . . . the trier of fact would have entertained a reasonable doubt of his guilt." Thus, the question whether the prisoner can make the requisite

> showing must be determined by reference to all probative evidence of guilt or innocence.

Id. at 454 n.17 (Powell, J., for a plurality) (quoting Henry Friendly, Is Innocence Irrelevant? Collateral Attack on Criminal Judgments, 38 U. Chi. L. Rev. 142, 160 (1970) (footnote omitted)) (emphasis in original). I believe that Schlup has met this standard, but, as the majority correctly notes, our court has applied a different standard, essentially reading the Supreme Court's decision in Sawyer as implicitly overruling Kuhlmann in this regard.

In Sawyer, the Supreme Court affirmed the Fifth Circuit, quoting with approval the test adopted by that court:

> "[W]e must require the petitioner to show, based on the evidence proffered plus all record evidence, a fair probability that a rational trier of fact would have entertained a reasonable doubt as to the existence of those facts which are prerequisites under state or federal law for the imposition of the death penalty."

Sawyer, 112 S. Ct. at 2523 (quoting Sawyer v. Whitley, 945 F.2d 812, 820 (5th Cir. 1991)). The Court then restated the test, changing it markedly in the process, in what has become an all too common sleight-of-hand. Despite its praise for the Fifth Circuit standard (which comes, of course, from Kuhlmann), the Court now requires that one arguing innocence of the death penalty provide "clear and convincing evidence that but for constitutional error, no reasonable juror would find him eligible for the death penalty." Id. I also believe that Schlup has satisfied this test, which our court has sua sponte, and in my view erroneously, extended to apply to convictions as well as to sentences. See Appellants' Briefs in Cornell v. Nix, 976 F.2d 376 (8th Cir. 1992) (en banc) (No. 90-1195), and McCoy v. Lockhart, 969 F.2d 649 (8th Cir. 1992) (No. 91-2856), neither of which argue for the extension of Sawyer. The Fifth Circuit, which was affirmed by the Supreme Court in Sawyer,

has not extended that ruling to convictions, ruling instead that the Kuhlmann standard continues to apply to convictions. See Montoya v. Collins, 988 F.2d 11, 13 (5th Cir.) (restricting Sawyer to the sentencing phase and continuing to apply Kuhlmann to the guilt phase), cert. denied, 113 S. Ct. 1630 (1993).

As a panel, we are of course bound by Cornell, but if ever there were a case in which the Supreme Court might wish to clarify the law on this issue, this is the one. Schlup has presented a strong case of actual innocence. I believe it meets the Cornell standard, and I believe it is "truly persuasive" as required by Herrera v. Collins, 113 S. Ct. 853, 869 (1993), but the majority does not. What either the majority or the district court, which noted that Schlup presented a stronger case of actual innocence than did Herrera (and the evidence has only increased since the district court's decision), would do if Schlup were simply required to show a "fair probability" of his innocence is not known, but only our court en banc or the Supreme Court can make that happen.

B

Once Schlup clears the procedural hurdles put in place by this court and the Supreme Court, the merits of his claim of ineffective assistance of counsel must be addressed. Schlup alleges that trial counsel's failure to conduct a reasonable investigation of the circumstances surrounding the murder deprived him of his rights under the Sixth Amendment. See Strickland, 466 U.S. 668. Petitioners alleging ineffective assistance of counsel must show both that counsel's performance failed to meet "the standard of reasonableness under prevailing professional norms" and that "but for counsel's ineffective assistance there is a reasonable probability that the result of the trial would have been different." Grooms v. Solem, 923 F.2d 88, 90 (8th Cir. 1991). The test for prejudice is substantially easier to satisfy than is the test for actual innocence (which I have already indicated Schlup's

evidence satisfies), so the only remaining question is whether the newly presented evidence could, and should, have been discovered by competent trial counsel.

Despite having access to transcripts of prisoner interviews, some of which contained statements of eyewitnesses, Schlup's counsel failed to conduct any reasonable investigation.[9] This court has held repeatedly that failure to interview potential alibi witnesses constitutes a lack of competence under Strickland. See, e.g., Grooms, 923 F.2d at 91; Lawrence v. Armontrout, 900 F.2d 127, 129-30 (8th Cir. 1990). Failure to interview potential eyewitnesses is unquestionably a more egregious failing than failure to interview alibi witnesses. In this case, Schlup offers both eyewitnesses and, at least indirectly, an alibi witness, all of whom would have been uncovered by a reasonable investigation of the circumstances surrounding Dade's murder.

John Green's statement that he had called the base, a statement that certainly would have bolstered Schlup's alibi, was available to trial counsel in the transcript of prisoner interviews conducted by Brooks.[10] Had counsel then interviewed Green, he could have asked the question that none of the transcripts of prisoner interviews reveals to have been asked of any prisoner:

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[9]Schlup's trial counsel apparently failed even to inquire of Stewart's and O'Neal's counsel about potential eyewitnesses. Both of these trials took place before Schlup's and both defense counsel presented eyewitnesses to Dade's murder. Some of those witnesses might not have helped directly, but counsel would have at least become aware that the crime occurred in a crowded cellblock and that the possibility of eyewitnesses should be investigated.

[10]I assume that transcripts of the prisoner interviews were available to trial counsel. Were they unavailable, Schlup is entitled to relief under Brady v. Maryland, 373 U.S. 83 (1967), due to the prosecution's failure to turn over such exculpatory evidence in violation of due process.

Was Lloyd Schlup present at Dade's murder?[11] Counsel would have had further incentive to interview McCoy[12] and Griffin-Bey, who both admitted to prison investigators that they witnessed the crime. They too could have been asked whether Schlup was present.

Even if counsel were not made aware either by Schlup or by prison authorities that there were witnesses to the murder, he was obligated simply by common sense to investigate the possibility. This murder occurred as prisoners were being released from their cells to go to lunch. The existence of witnesses to the murder was as inevitable as their reluctance to cooperate either with prison investigators or with a room full of lawyers and O'Neal.[13] Counsel's failure to investigate these witnesses and the other

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[11]George Brooks indicated in his deposition that he only asked the inmates if they had witnessed Dade's murder or anything else unusual on that date. In short, the inmates were being asked by prison guards to "snitch" on fellow inmates when the eyewitnesses were all too aware that the guards were in no position to provide protection from the perpetrators and their cronies. This murder took place in the Special Management Unit, also known as "SuperMax," yet even prison personnel were fearful of appearing in this area alone. See Deposition of William Rutledge, Associate Warden, at 16, 19 (June 29, 1984). The latest inmate affidavits indicate that they too were afraid to travel alone even to lunch, as evidenced by several of them waiting for friends before walking to the dining room.

[12]Counsel did depose McCoy but the record indicates no effort to interview him outside of the presence of the prosecutor or O'Neal. One purpose of such an interview might have been to reconcile his deposition with his earlier statement to prison investigators. See supra n.3. Schlup's counsel informs us that McCoy is now dead, so I presume no further explanation will be forthcoming.

[13]Several of the depositions of inmates who refused to answer questions reflect the prosecutor's belief that O'Neal was responsible for the inmates' reticence. It seems quite likely that an interview in O'Neal's presence would not be the most conducive environment in which to gain the cooperation of eyewitnesses, yet the record reveals that Schlup's counsel made no effort to contact eyewitnesses (as opposed to alibi witnesses) individually.

eyewitnesses was unreasonable under our case law, and Schlup is therefore entitled to relief if these witnesses' testimony were to survive the rigors of an evidentiary hearing.

IV

Under Delo v. Blair, 113 S. Ct. 2922 (1993) (per curiam), all that is required for a stay to issue on a second or subsequent habeas petition is that the petitioner present "'substantial grounds upon which relief might be granted.'" Id. at 2923 (quoting Herrera v. Collins, 113 S. Ct. 853, 873 (1993) (O'Connor, J., concurring)). In Blair, the Court objected to the issuance of a stay because the district court had stated that the facts in that case mirrored those that the Court had recently rejected in Herrera. This case is distinguishable on a number of grounds.

First, Schlup is not relying exclusively on a constitutional claim of actual innocence, but is using innocence as a gateway to reach the merits of his ineffective assistance claim. Second, the district court indicated that Schlup has presented a stronger case than did Herrera in that Schlup's affidavits do not consist of hearsay but of eyewitness testimony, and Herrera was, in the opinion of the district court, "convicted on the basis of a larger quantity of evidence than was presented at [Schlup]'s trial." Schlup v. Delo, No. 4:92CV00443, slip op. at 11 (E.D. Mo. Aug. 23, 1993).[14] Third, those affidavits presented by Schlup that identify

[14]The only significant evidence presented by the state at Schlup's trial was the testimony of two prison guards who gave conflicting statements as to the details but who both testified that Schlup was the third participant with O'Neal and Stewart. Unlike O'Neal, whose clothing was covered with Dade's blood, no physical evidence linked Schlup to this crime. Neither guard has ever been asked about Randy Jordan, whom Schlup asserts was the prison "snitch." In addition, Schlup's counsel informed us during oral argument that one of the two prison guards has, and had at the time of Schlup's trial, a criminal record that includes three felonies. Under Missouri law, these felonies, though not of recent

the actual perpetrator point to Randy Jordan, whose whereabouts are presently unknown but, unlike in Herrera and Blair, who is not known to be deceased. And fourth, Schlup has maintained his innocence since the beginning, while both Blair and Herrera had, knowingly and voluntarily or not, confessed. Schlup presents a much stronger case of actual innocence than did either Blair or Herrera. The present petition presents substantial grounds upon which relief might be granted, and we should therefore stay Schlup's execution and remand this case to the district court for an evidentiary hearing.

V

The legal rulings by this court and by the district court place Lloyd Schlup in an inextricable bind. Why, the court asks, did you not present this evidence sooner? Because my earlier counsel failed to conduct a reasonable investigation, Schlup responds. Why then do you not present us with pillars of the community to prove your innocence? Because the crime occurred in prison, he replies, and few pillars of the community occupy prison cells. That, says the court, is unfortunate, for absent virtuous eyewitnesses or a time machine, there is nothing we can do. Just as the Ninth Circuit told Henry Deutscher in regard to his death sentence,[15] this court tells Lloyd Schlup in regard to his

origin, could have been introduced to impeach Maylee if trial counsel had only conducted sufficient investigation to uncover their existence. The record reveals no evidence that such an inquiry took place, and the jury was consequently deprived of this evidence as well.

[15]See Deutscher v. Whitley, 991 F.2d 605, 606 (9th Cir. 1993) (holding that although Deutscher had "shown to [the court's] satisfaction that it is more probable than not that, but for his constitutionally deficient counsel, he would not have been sentenced to die," he nonetheless did not satisfy the new standard set by the Supreme Court in Sawyer, and consequently did not merit relief).

conviction: You may indeed be innocent, but you are not innocent enough early enough.

Justice requires that we remand this matter to the United States District Court for an evidentiary hearing.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 93-3272EM

Lloyd Schlup,

Appellant,

v.

Paul Delo, Superintendent, Potosi Correctional Center,

Appellee.

[TO BE PUBLISHED]

Filed: November 17, 1993

Before RICHARD S. ARNOLD, Chief Judge, McMILLIAN, JOHN R. GIBSON, FAGG, BOWMAN, WOLLMAN, MAGILL, BEAM, LOKEN, HANSEN, and MORRIS SHEPPARD ARNOLD, Circuit Judges.

ORDER

The suggestion for rehearing en banc and the motion for stay of execution are denied. Chief Judge Arnold, Judge McMillian, and Judge Wollman would grant the suggestion and the motion.

RICHARD S. ARNOLD, Chief Judge, dissenting, joined by McMILLIAN and WOLLMAN, Circuit Judges.

I would grant the suggestion for rehearing en banc to consider two questions raised by the petitioner Lloyd Schlup.

1. Schlup argues that he is actually innocent of the crime of capital murder in the sense necessary to enable this Court to avoid the state's procedural defenses and reach the merits of his contention that his trial counsel was ineffective. In assessing this claim, our panel applied the rule of McCoy v. Lockhart, 969 F.2d 649 (8th Cir. 1992). In McCoy, we held that a miscarriage of justice for purposes of avoiding procedural defenses can be found only when petitioner has shown by clear and convincing evidence that but for the constitutional error, no reasonable juror could find him guilty. 969 F.2d at 651. The McCoy Court lifted this standard from Sawyer v. Whitley, 112 S. Ct. 2514 (1992), a case having to do only with the question of punishment, not that of guilt or innocence.

As our panel in the present case acknowledged, there is some warrant for Schlup's argument that Sawyer was intended by the Supreme Court to apply only to questions of punishment, and that the Sawyer opinion itself preserves unchanged, for purposes of the guilt-phase, the earlier standard of Kuhlmann v. Wilson, 477 U.S. 436 (1986) (requiring a petitioner to show a fair probability that, in light of all the evidence, the jury would have entertained a reasonable doubt of his guilt). See Sawyer, 112 S. Ct. at 2519 n.5.

Our panel did what it had to do. It was bound to follow McCoy and it did not, as a panel, err in doing so. It seems to me, though, that there is a substantial question whether McCoy correctly interpreted Sawyer. This is a question of great importance in habeas corpus jurisprudence, and I believe it qualifies as deserving of this Court's en banc time.

2. Petitioner raises another "innocence" issue - this one an independant ground for habeas relief, rather than just a gateway through which procedural defenses can be avoided. As I understand the various opinions in Herrera v. Collins, 113 S. Ct. 853 (1993),

a majority of the Court appears to believe that, in a sufficiently strong case, innocence would be a ground for habeas relief. The case would have to be "truly persuasive" and "extraordinary." We know that these standards were not met in Herrera itself or in Delo v. Blair, 113 S. Ct. 2922 (1993) (per curiam). In Blair, a stay of execution was dissolved on the ground that the evidence of innocence was no more persuasive than that presented in Herrera.

In my view, it is likely that Schlup's evidence of innocence is substantially more persuasive than Herrera's or Blair's. I am not nearly so familiar with the record as the members of the panel, but Judge Heaney's dissent convinces me that there is at least a substantial likelihood that a trier of fact would consider Schlup's evidence sufficiently persuasive to meet the high Herrera standard if an evidentiary hearing were held. To be sure, there are contradictions in both sides' evidence, and I agree with the panel that, even after all of the new evidence is considered, a reasonable jury could still find Schlup guilty. In this sense, the Herrera standard seems easier to meet than the Sawyer standard, which is quite close to that of Jackson v. Virginia, 443 U.S. 307 (1979). In other words, under Herrera, if evidence is newly discovered, a habeas petitioner could obtain relief by making a "truly persuasive" or "extraordinary" case, even if, after considering the new evidence, a reasonable jury could still convict him.

This, at any rate, seems to me the present state of the law. If I am right, Schlup may have a substantial ground for relief. Whether he does or not is admittedly a fact-intensive question, not the sort of thing of which en banc proceedings are normally made. But where human life is at stake, I believe rehearing en banc is appropriate whenever a petitioner makes a substantial claim, even if it is fact-specific.

For these reasons, I would grant the suggestion for rehearing

en banc, and I respectfully dissent from the order denying it.

A true copy.

Attest: Michael E. Gans

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

FILED

AUG 23 1993

U. S. DISTRICT COURT
E. DIST. OF MO.
ST. LOUIS

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

LLOYD SCHLUP, Petitioner,	)	
v.	)	Cause No. 4:92CV00443
PAUL DELO, Superintendent Potosi Correctional Center, Respondent.	)	

MEMORANDUM AND ORDER

This matter is before the Court pursuant to Lloyd Schlup's Petition for Writ of Habeas Corpus. Also pending before the Court are Petitioner's Supplemental Motion for Evidentiary Hearing, Petitioner's Supplemental Motion to Expand the Record and Respondent's Motion to Vacate Stay of Execution.

I. Background

On March 3, 1986, Petitioner Lloyd Schlup was convicted of the capital murder of Arthur Dade and sentenced to death by the St. Charles County Circuit Court. The murder took place on 1 Walk of Housing Unit 5-A of the Special Management Unit of the Jefferson City Correctional Center (JCCC)[1]. At the time of the murder, Petitioner and Arthur Dade were inmates at JCCC. In separate trials, Robert O'Neal and Rodney Stewart were also convicted of the murder of Arthur Dade. State v. O'Neal, 718 S.W.2d 498 (Mo. banc 1986); State v. Stewart, 714 S.W.2d 724 (Mo. Ct. App. 1986).

Petitioner unsuccessfully appealed his conviction in state

[1] At the time of the murder, JCCC was known as the Missouri State Penitentiary.

court. State v. Schlup, 724 S.W.2d 236 (Mo. banc 1987), cert. denied 482 U.S. 920 (1987). Petitioner also filed a motion for post-conviction relief pursuant to Missouri Supreme Court Rule 27.26 (repealed 1988). The motion court denied relief and the Missouri Supreme Court affirmed. Schlup v. State, 758 S.W. 2d 715 (Mo. banc 1988). Petitioner subsequently filed a petition for writ of habeas corpus in federal court. The court denied the petition. Schlup v. Armontrout, No. 89-0020-C-3 (E.D. Mo. November 21, 1989) (unpublished opinion), aff'd, 941 F.2d 1062 (8th Cir. 1991), cert. denied 112 U.S. 1273 (1992). Immediately after his petition for writ of certiorari was denied by the United States Supreme Court, Petitioner filed a Motion for Reconsideration of the Judgment pursuant to Fed. R. Civ. P. 60(b)(6). The district court denied the Rule 60(b)(6) Motion on the ground that Petitioner's successive claims were untimely filed and Petitioner's new claims were best raised in a petition for writ of habeas corpus. Schlup v. Armontrout, No. 89-0020-C-3 (E.D. Mo. March 10, 1992)(unpublished opinion). Petitioner filed the instant petition on March 11, 1992.

Petitioner asserts the following seven claims in support of his petition: (1) Petitioner has newly discovered evidence that establishes his innocence of the murder; (2) trial counsel was ineffective because he failed to interview or call as witnesses several individuals who could have testified that Petitioner was not present at the scene of the murder; (3) trial counsel was ineffective because he failed to investigate, rebut and object to the testimony of the state's key witnesses; (4) the prosecution

failed to disclose material exculpatory evidence concerning Petitioner's involvement in the murder; (5) trial counsel failed to conduct a reasonable investigation into Petitioner's background and mental health; (6) trial counsel was ineffective because he failed to conduct an investigation into the facts and circumstances of the aggravating circumstances presented during the penalty phase of the trial; and (7) the prosecution failed to disclose exculpatory evidence concerning the aggravating circumstances. Claims 1, 3, 4, 6, and 7 are raised for the first time in the instant petition. [Hereinafter collectively referred to as "the new claims."] Claims 2 and 5 were raised in Petitioner's first habeas petition. [Hereinafter collectively referred to as "the successive claims."]

II. The New Claims

A. Standard

The majority of Petitioner's claims are raised for the first time in this petition. The Court may not consider claims raised for the first time in a successive habeas petition if the petitioner has "deliberately withheld the newly asserted ground or otherwise abused the writ." 28 U.S.C. § 2244(b). See also Rules Governing Section 2254 Cases in the United States District Courts, Rule 9(b). The Court may consider new claims raised in a successive petition if the petitioner can establish cause for not previously raising the claims and prejudice from his failure to do so. McCleskey v. Zant, 111 S.Ct. 1454, 1470 (1991); Shaw v. Delo, 971 F.2d 181, 184 (8th Cir. 1992). To establish cause the petitioner must show that

"'some objective factor external to the defense impeded counsel's efforts'" to raise the claim in the first petition. McCleskey, 111 S.Ct. at 1454, 1470 (citing Murray v. Carrier, 477 U.S. 478, 488 (1986)).

Claims that are barred by the cause and prejudice standard may be heard if Petitioner "can show that a fundamental miscarriage of justice would result from a failure to entertain the claim." Id. The scope of the fundamental miscarriage of justice exception is narrow. Sawyer v. Whitley, 112 S. Ct. 2514, 2519 (1992); Nolan v. Armontrout, 973 F.2d 615, 617 (8th Cir. 1992). In Sawyer, the Supreme Court announced that the miscarriage of justice exception applies when the petitioner establishes by "clear and convincing evidence that but for a constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty under the applicable state law." Sawyer, 112 S.Ct. at 2517. The same standard also applies to habeas challenges to the conviction itself. McCoy v. Lockhart, 969 F.2d 649 (8th Cir. 1992). See also Shaw v. Delo, 971 F.2d 181, 185-86 (8th Cir. 1992); Cornell v. Nix, 976 F.2d 376, 381 (8th Cir. 1992)(en banc).

B. Cause

The government bears the burden of pleading abuse of the writ. McCleskey, 111 S.Ct. at 1470. Respondent in the instant case has set forth Petitioner's writ history, identified the new claims in the instant petition and alleged that Petitioner has abused the writ with respect to those new claims. Thus, Respondent has satisfied his burden and the burden shifts to Petitioner to show

cause for failing to raise Claims 1, 3, 4, 6, and 7 in his previous petition and prejudice resulting from his failure to do. See id.

Petitioner asserts three theories in support of his contention that he had cause for failing to raise Claims 1, 3, 4, 6, and 7 in his previous petition. First, Petitioner asserts that his counsel failed to permit him to participate in the litigation of his first petition. Second, Petitioner contends that the conduct of former Missouri Supreme Court Justice Billings intimidated his Rule 27.26 counsel and his first habeas counsel and prevented them from thoroughly investigating and presenting Petitioner's claims. Finally, Petitioner asserts that the State failed to disclose exculpatory evidence. None of these theories is persuasive.

Petitioner maintains that he was denied a meaningful opportunity to participate in the litigation of his first habeas petition.[2] Specifically, Petitioner contends that although he included the names of all known exculpatory witnesses in his pro se petition[3] and in his Rule 27.26 motion, no lawyer ever contacted these witnesses. Petitioner also states that his mother maintains a file of documents concerning her son's case and that she has been frustrated in her attempts to have counsel pursue her suggested avenues of investigation.

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[2] Insofar as Petitioner contends that this failure was due to conduct of Justice Billings, the Court's discussion in Section II.A.ii. of this Memorandum and Order, infra, applies.

[3] Petitioner filed his first petition for writ of habeas corpus pro se. The court appointed counsel to represent Petitioner and granted Petitioner's appointed counsel leave to file an amended petition.

In support of his contention that this alleged conduct constitutes cause, Petitioner cites Williams v. Lockhart, 862 F.2d 155 (8th Cir. 1988). In Williams, petitioner alleged that his trial counsel filed and litigated his first habeas petition without petitioner's knowledge or participation. Id. at 159. The court of appeals remanded the case to the district court for a determination of whether petitioner had consented to the previous habeas petition. The court stated:

> This is a critical question of fact, for Williams should not be allowed to accept [the attorney's] representation and then later disavow it. Conversely, he should not be bound by what [the attorney] did unless he somehow authorized or ratified [the attorney's] efforts on his behalf.

Id. A petitioner may consent to the actions of his attorney either expressly or by implication. Id.

In the instant case, Petitioner does not allege that the attorney who filed his first habeas petition acted without his knowledge or participation. Therefore, the reasoning of Williams is not applicable here. Nor can this element of Petitioner's argument succeed under the assumption that Petitioner has alleged that his habeas counsel was ineffective. Because there is no constitutional right to counsel in a habeas case, the ineffectiveness of habeas counsel does not constitute cause. Coleman v. Thompson, 111 S.Ct. 2546, 2567-68 (1991); Nolan v. Armontrout, 973 F.2d 615, 617 (8th Cir. 1992).

Petitioner also maintains that Justice Billings contacted the Circuit Judge presiding over Petitioner's Rule 27.26 hearing and ordered him to deny all requests for extensions of time. In

addition, Petitioner maintains that the Missouri Supreme Court issued numerous execution warrants against Petitioner during the pendency of his state post-conviction motion thereby requiring Petitioner's Rule 27.26 counsel to spend his time preparing motions for stay of execution rather than investigating Petitioner's case. Petitioner submits several affidavits in support of his contention that Justice Billings regularly admonished circuit judges presiding over capital cases not to entertain delays or grant continuances.

Assuming that Petitioner's allegations are correct, the Court finds that they do not constitute cause for Petitioner's failure to raise Claims 1, 3, 4, 6, and 7 in his previous habeas petition. The alleged difficulties encountered by Petitioner's state post-conviction relief counsel do not explain Petitioner's failure to include his new claims in his first federal habeas petition. Obviously, Justice Billings had no jurisdiction over the judge presiding over the federal habeas case. Nor does Petitioner allege that Justice Billings attempted to interfere with the federal habeas proceedings. By affidavit Petitioner's first federal habeas counsel states that he was reluctant to raise the issue of Justice Billings' conduct in the first federal habeas petition because he had previously experienced reprisals from state court judges after criticizing their conduct. The Court finds, however, that counsel's reluctance to risk the wrath of Justice Billings does not constitute an objective factor external to the defense and therefore cannot constitute cause for Petitioner's failure to raise his new claims in his previous petition.

Petitioner maintains that state officials interfered with his ability to raise the new claims in his previous petition because they had exculpatory evidence in their possession and failed to disclose said evidence to Petitioner. In the portion of Petitioner's Suggestions addressing the merits of his constitutional claims, Petitioner develops his contention that the alleged withholding of this evidence interfered with his constitutional rights at the trial phase. However, Petitioner never develops his claim that the alleged failure to disclose exculpatory evidence to his trial counsel interfered with his ability to present all of his claims in his first habeas petition. Thus, the Court finds that these allegations do not constitute cause under the standard enunciated in McCleskey.

For all of the foregoing reasons, the Court concludes that Petitioner has not shown cause for his failure to raise his new claims in his prior habeas petition. Because Petitioner has not shown cause for failing to raise Claims 1, 3, 4, 6, and 7 in his previous petition, the Court need not consider whether he would be prejudiced by his inability to raise them in the instant case.. McCleskey, 111 S.Ct. at 1474.

C. Miscarriage of Justice Exception

As previously noted, the Court must consider Petitioner's new claims if Petitioner establishes by clear and convincing evidence that but for a constitutional error, no reasonable juror would have found him guilty of the murder of Arthur Dade or eligible for the death penalty under Missouri law.

Claim 1

Petitioner claims that his continued incarceration and imposition of the death penalty violate the due process clause of the Fourteenth Amendment because Petitioner has obtained newly discovered evidence that establishes his innocence. In addition, Petitioner claims that his execution would violation the Eighth Amendment ban on cruel and unusual punishment because it is unconstitutional to execute an innocent person.

The Court may only consider newly discovered evidence in a habeas proceeding when the evidence is directly relevant to the constitutionality of the petitioner's continued incarceration. Townsend v. Sain, 372 U.S. 293, 317 (1963); Herrera v. Collins, 113 S.Ct. 853, 860 (1993). "[T]he existence merely of newly discovered evidence relevant to the guilt of a state prisoner is not a ground for relief on federal habeas corpus." Townsend, 372 U.S. at 317.

In the instant case, Petitioner maintains that the evidence is relevant to his claim that the execution of an innocent person would violate the Eighth and Fourteenth Amendments to the United States Constitution and therefore should be considered. Petitioner relies heavily on his claim of actual innocence and he submits as new evidence in support of that claim the affidavits of inmates who assert that they witnessed the murder of Arthur Dade and did not see Petitioner at the scene.[4]

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[4] In his Supplemental Motion to Expand the Record, Petitioner seeks leave to introduce additional affidavits. The Court has reviewed those affidavits and concludes that although they are more detailed than the previously submitted affidavits, they do not change the Court's analysis of Petitioner's actual innocence claim.

The Supreme Court has recently considered whether actual innocence is an independent ground for federal habeas corpus relief. Herrera, supra. Petitioner in Herrera claimed that he was scheduled to be executed for a murder he did not commit. Writing for the Court, Justice Rehnquist noted that actual innocence is not an independent constitutional claim but, rather, "a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits." Id. at 862. See also id. at 869. However, the Court also stated:

> We may assume, for the sake of argument in deciding this case, that in a capital case a truly persuasive demonstration of "actual innocence" made after trial would render the execution of a defendant unconstitutional, and warrant federal habeas relief if there were no state avenue open to process such a claim. But because of the very disruptive effect that entertaining claims of actual innocence would have on the need for finality in capital cases, and the enormous burden that having to retry cases based on often stale evidence would place on the States, the threshold showing for such an assumed right would necessarily be extraordinarily high.

Id. at 869. Thus, it is appropriate for the court to consider whether Petitioner has made a persuasive showing of actual innocence.

Herrera supported his claim of actual innocence with affidavits wherein the affiants asserted that Herrera's since deceased brother committed the murder. The Court held that the affidavits were not sufficient to warrant relief on Petitioner's actual innocence claim. The Court noted that the affidavits were filed over eight years after petitioner's trial and stated that

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Therefore, Petitioner's Motion to Expand the Record will be denied.

"there is something suspect about a defense witness who is not identified until after the 11th hour has passed." Id. at 869 (quoting Taylor v. Illinois, 484 U.S. 400 (1988)). See also Bolder v. Delo, 985 F.2d 941, 943 (8th Cir. 1993)(affidavits filed at the eleventh hour and over twelve years after the state trial are to be treated with skepticism); Delo v. Blair, 1993 U.S. LEXIS 4633 (July 21, 1993)(vacating stay of execution imposed by court of appeals even though petitioner submitted seven affidavits in support of his claim of actual innocence). The Court further discredited Herrera's affidavits because all but one of the affidavits consisted of hearsay and the affidavits did not present a consistent account of the murder. Id. at 869. The Court also stated that the affidavits must be considered in light of the proof offered at trial. Herrera, 113 S.Ct. at 870. Herrera had been convicted of murder on the strength of two eyewitness accounts, numerous pieces of circumstantial evidence and a handwritten note in which Herrera strongly implied that he was responsible for the murder. Id. at 872.

The affidavits presented by Petitioner do not suffer from all of the same infirmities that caused the Supreme Court to discredit the affidavits submitted by Herrera. The instant case is also distinguishable from Herrera in that Herrera was convicted on the basis of a larger quantity of evidence than was presented at Petitioner's trial. However, upon review of the transcript, Petitioner's new evidence, and the arguments of counsel, the Court finds that Petitioner has failed to make a persuasive showing of

actual innocence. The affidavits submitted by Petitioner were all executed in the early months of 1992, approximately six years after Petitioner's state court trial. As previously noted, there is something suspect about affidavits produced after a long delay. Herrera, 113 S.Ct. at 872 (O'Connor concurring). Moreover, Petitioner's affiants are all fellow inmates who do not necessarily have a strong incentive to refrain from perjuring themselves. See Hall v. Lockhart, 806 F.2d 165, 168 (8th Cir. 1986). Considered in light of the positive identifications made by Officers Flowers and Maylee, the Court cannot say that these affidavits constitute a persuasive showing of actual innocence sufficient to warrant disruption of the state court's finding of guilt.

Claim 3

The States's primary evidence at trial was the eyewitness testimony of Corrections Officers John Maylee[5] and Lt. Roger Flowers. See TR at 234-94; 331-363. Petitioner contends that Flowers and Maylee gave testimony in the trials of Petitioner's co-defendants O'Neal and Stewart that was inconsistent with their testimony during Petitioner's trial. In addition, Petitioner maintains that the testimony of Flowers was inconsistent with the testimony of Maylee and that both witnesses offered testimony that was inconsistent with prior sworn statements. Petitioner contends that he was denied effective assistance of counsel because his trial counsel failed to adequately investigate, object to and rebut the testimony of Flowers and Maylee.

[5] The testimony of John Maylee was presented by deposition.

In his Suggestions, Petitioner details various inconsistencies between the accounts of the murder given by Officers Flowers and Maylee.[6] Obviously, these discrepancies were before the jury at the time of their deliberations. Moreover, Petitioner's trial counsel emphasized discrepancies between the testimony of Maylee and Flowers in his closing argument. TR. 495-96.

Petitioner also contends that the jury did not have the opportunity to consider certain inconsistencies between Officer Flowers' trial testimony and prior sworn statements.[7] However, upon review of these inconsistencies, the Court cannot say that they are material to a determination of Petitioner's guilt or innocence such that no reasonable juror would have convicted Petitioner had they been noted at trial.

Finally, Petitioner points to certain inconsistencies between the testimony of Officer Maylee and certain previous statements. According to Petitioner, these inconsistencies render suspect Maylee's contention that he was able to see the murder from his position three levels above the scene of the crime.[8] However, as

[6] For example, Officer Flowers testified that he saw Stewart walking toward Dade against the flow of inmates coming out of 1 Walk toward the cafeteria. TR. 242. Officer Maylee testified that he saw O'Neal, Schlup and Stewart running in the same direction. TR. 332.

[7] These inconsistencies concern whether Flowers saw Stewart hitting Arthur Dade in the face or in the stomach and whether Flowers saw Petitioner run toward the back of the hallway after the murder or whether he did not see where Petitioner went after the murder.

[8] The murder took place on 1 Walk of Housing Unit 5-A. 1 Walk is on the first floor of the prison. Maylee was stationed on 7-8 Walk which is on the fourth floor of the prison. Petitioner does

Petitioner notes, trial counsel did address the visibility issue and "established ... that Maylee's ability to view the scene from the top floor of the cell block was at least questionable." Suggestions, p. 26 n. 14 (citing TR. 193-205). The jury had the opportunity to consider the credibility of Maylee and to determine whether he was able to see all that he said he was able to see. The Court finds that the evidence relied upon by Petitioner is not so substantial that had it been introduced no reasonable juror would have credited Maylee's testimony.

Claim 4

As previously noted, Petitioner claims that the state failed to disclose material exculpatory evidence in its possession. Petitioner states that the prison's chief investigators interviewed Lamont Griffin-Bey and Ricky McCoy, two inmates who claimed to have witnessed the murder. Petitioner contends that when Griffin-Bey and McCoy were shown a photograph of Petitioner the witnesses indicated that Petitioner was not involved in the murder of Arthur Dade. In addition, Petitioner claims that several witnesses testified at the trials of Robert O'Neal and Rodney Stewart that Petitioner was not present at the scene of the murder. Petitioner contends that the state did not provide him with this information and the only information he received was "an incomplete transcript of cursory interviews with several inmates." Suggestions, at 75.

Review of the transcript indicates that Petitioner's trial

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not dispute that 1 Walk is visible from certain positions on 7 Walk.

counsel used portions of the transcript of both the O'Neal and the Stewart trials to impeach the testimony of Officer Flowers. TR. 267; 279; 281. In addition, Petitioner acknowledges that he received transcripts of the witnesses' interviews with prison investigators. Thus, the substance of Claim 3 amounts to an allegation that certain witnesses were shown a photograph of Petitioner and indicated that he was not a participant in the murder of Arthur Dade.

As Respondent notes, Petitioner has submitted the affidavit of Griffin-Bey. In addition, Petitioner has submitted the transcripts of the witnesses' interviews with prison investigators. The affidavit of Griffin-Bey is dated January 21, 1992. In his affidavit, Griffin-Bey states that he saw the stabbing of Arthur Dade and Petitioner was not involved. He does not state that prison investigators showed him a photograph of Petitioner. Thus, nothing in the record supports Petitioner's contention that the exculpatory evidence Petitioner relies on even exists. Careful review of the interview transcripts submitted by Petitioner does not alter this conclusion.

Claim 6

Petitioner contends that his trial counsel was ineffective because he failed to conduct an investigation into the facts and circumstances of Petitioner's convictions for the assault of cell-mate Larry Wickizer and the assault and sodomy of fellow inmate Harold Johnson. Petitioner contends that the assault and sodomy of Harold Johnson occurred when Petitioner was experiencing extreme

mental disturbance that caused him to inhale bug spray in order to alter his state of consciousness. Petitioner further states that at his trial for the assault of Larry Wickizer, several witnesses verified Petitioner's contention that the assault was committed in self-defense.

The state introduced evidence concerning the prior convictions during the penalty phase of Petitioner's trial in order to establish that Petitioner had prior serious assaultive criminal convictions and therefore was eligible for the death penalty. See Mo. Rev. Stat. § 565.032.2(1). The state also relied on the fact that Petitioner was incarcerated at the time of the murder. Mo. Rev. Stat. § 565.032.2(9). Assuming for the sake of argument that trial counsel was ineffective for failing to conduct an investigation into the circumstances of Petitioner's prior assault convictions, the Court cannot say that in the absence of this constitutional error no reasonable juror would have found Petitioner eligible for the death penalty. Where the jury finds more than one statutory aggravating circumstance, the subsequent failure of one circumstance does not invalidate the other. Mercer v. Armontrout, 844 F.2d 582, 584 (8th Cir. 1988)(en banc); State v. La Rette, 648 S.W.2d 96, 102 (Mo. banc.), cert. denied, 464 U.S. 908 (1983). Therefore, even assuming that the jury might have viewed the prior assaults in a different light had trial counsel more thoroughly investigated the circumstances surrounding those assaults, a reasonable juror could nonetheless have found Petitioner eligible for the death penalty.

Claim 7

Petitioner states that the government knew and failed to disclose that several witnesses had testified in support of Petitioner's defense of self-defense at his trial for the assault of Larry Wickizer. Evidence concerning Petitioner's conviction for the assault of Larry Wickizer was introduced in the penalty portion of Petitioner's trial. Because Petitioner's conviction for the assault of Larry Wickizer was only relevant in establishing one of two statutory aggravating circumstances, the analysis set forth immediately above applies to this claim as well.

III. Successive Claims

In his first habeas petition, Petitioner claimed, inter alia, that trial counsel was ineffective because he failed to investigate or call additional witnesses[9] and because he failed to introduce psychological or psychiatric testimony as mitigating evidence. The district court held that these claims were procedurally barred due to Petitioner's failure to raise the issues in state court. The court held that the ineffectiveness of post-conviction counsel could not constitute the cause necessary to excuse the procedural default. The Eighth Circuit subsequently announced that the ineffectiveness of post-conviction counsel can excuse a procedural default. Because the record did not contain the evidence necessary

[9] Petitioner raised the claim with regard to the following witnesses: Robert O'Neal, Van Robinson, Lamont Griffin and Ricky McCoy. In his current petition, Petitioner reasserts this claims with respect the aforementioned persons and also includes the trial attorney's failure to interview and call as witnesses the following individuals: Donnie Trendley, Michael Riley, Michael Dunn and John Green.

to determine whether appellate counsel or post-conviction counsel were ineffective, the court of appeals bypassed the procedural bar issue and addressed Petitioner's claims on the merits. Schlup v. Armontrout, 941 F.2d 631 (8th Cir. 1991). The court held that trial counsel was not ineffective for failing to call the additional witnesses because their testimony would be either damaging or repetitive. Id. at 639. With respect to Petitioner's claim concerning mitigating psychological or psychiatric evidence, the court held that the undeveloped evidence "would not with 'reasonable probability' have been likely to change Schlup's sentence." Id. (citing Strickland v. Washington, 466 U.S. at 694, 699-700).

As a general rule, courts may not consider the merits of claims raised in a previous habeas petition when those claims were determined on the merits. Sawyer v. Whitley, 112 S.Ct. 2514, (1992); Kuhlmann v. Wilson, 477 U.S. 436 (1986). However, the court may address successive claims when the ends of justice so require. Sawyer, 112 S.Ct. at 2519; Kuhlmann, 477 U.S. at 454. This exception is governed by the actual innocence standard announced in Sawyer. See Sawyer, 112 S.Ct. at 2518-19.

Claim 2

Petitioner contends that counsel was ineffective for failing to interview and call as witnesses certain inmates who claim to have seen the murder of Arthur Dade and who state that Petitioner was not involved. Certainly these affidavits constitute probative evidence that may or may not have swayed the jury had they been

presented at trial. However, in view of the countervailing evidence that was presented, the Court cannot say that even upon consideration of all of the materials currently in the record no reasonable juror would have voted to convict Lloyd Schlup of the murder of Arthur Dade.

Claim 5

Petitioner contends that his trial counsel was ineffective in that he failed to conduct a reasonable investigation into Petitioner's background and mental health. Petitioner maintains that a reasonable investigation into these matters would have disclosed substantial mitigating evidence including a history of severe child abuse, mental illness, and severe organic brain damage. In support of this contention, Petitioner submits affidavits from family members, an electroencephalograph report and the report of Dr. William A. O'Connor, a licensed clinical psychologist. (Exh. B)

During the penalty phase of Petitioner's trial, the jury heard testimony from Lloyd Schlup's mother regarding Mr. Schlup's difficult upbringing. Schlup v. Armontrout, 941 F.2d 631, 639 (8th Cir. 1991). The jury also heard testimony regarding a prior assault conviction and the fact that the murder of Arthur Dade occurred while Petitioner was incarcerated. The jury determined that these statutory aggravating circumstances rendered Petitioner eligible for the death penalty. Even if the statements of family members, the electroencephalograph report and the report of Dr. O'Connor had been before the jury, it cannot be said that no reasonable juror

would have found that the statutory aggravating circumstances nonetheless rendered Petitioner eligible for the death penalty. See Sawyer, 112 S.Ct. at 2524.

For all of the foregoing reasons,

IT IS HEREBY ORDERED that Lloyd Schlup's Petition for Writ of Habeas Corpus is DENIED.

IT IS FURTHER ORDERED that Petitioner's Supplemental Motion for Evidentiary Hearing is DENIED.

IT IS FURTHER ORDERED that Petitioner's Supplemental Motion to Expand the Record is DENIED.

IT IS FURTHER ORDERED that Respondent's Motion to Vacate the Stay of Execution is GRANTED.

IT IS FURTHER ORDERED that the stay of execution entered in this matter on March 12, 1992 is VACATED as of ten (10) days from the date of this Order.

Dated this 23rd day of August, 1993.

Jean C. Hamilton
UNITED STATES DISTRICT JUDGE

IN THE SUPREME COURT OF THE UNITED STATES

No. 93-A-427

LLOYD E. SCHLUP, JR.,

Petitioner

v.

PAUL DELO, SUPERINTENDENT, POTOSI CORRECTIONAL CENTER

Respondent.

EXHIBIT 1

FACTUAL BRIEF ON THE ISSUE OF INNOCENCE
IN SUPPORT OF MOTION FOR STAY OF EXECUTION

MISSOURI CAPITAL PUNISHMENT
RESOURCE CENTER

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FACTUAL BRIEF ON THE ISSUE OF INNOCENCE

Mr. Schlup was convicted and sentenced to death for a murder that happened in the Missouri State Penitentiary on February 3, 1984. The state's evidence of Mr. Schlup's guilt at trial consisted of a single eye-witness (a Corrections Officer named Roger Faherty) and the deposition of another Corrections Officer, John Maylee. Both men claimed to have seen Mr. Schlup commit the crime. No physical evidence corroborates their testimony. The murder happened on one-walk of a maximum security housing unit just as the prisoners were let out of their cells to go to the dining room for lunch.

Numerous eye-witnesses who were not called at trial say that Lloyd Schlup was not involved in the murder. Their testimony is corroborated by persuasive evidence that Mr. Schlup was in the dining room when Dade was stabbed. Mr. Dade is an African-American man who was stabbed by members of a white supremacist prison gang, and many of the witnesses who clear Mr. Schlup are African Americans, and friends of Mr. Dade. It is unlikely that they would lie for Mr. Schlup if he were guilty.

The evidence tendered to the court below prompted Judge Heaney to observe, "Schlup presents new evidence of his actual innocence that is truly persuasive." Schlup v. Delo, No. 93-3272, Slip op. at 13 (8th Cir., Nov. 15, 1993). Even the district court, denying relief under the restrictive miscarriage of justice standard now in place in the Eighth Circuit, observed that Mr. Schlup's case is distinguishable from Herrera v. Collins, 113 S. Ct. 853 (1993), because the evidence of Schlup's guilt is weaker, and the evidence of innocence is stronger. Schlup v. Delo, No. 4:92CV000443, Slip op. at 11 (E.D. Mo., Aug. 23, 1993).

Mr. Schlup is probably innocent. Under Cornell v. Nix, 976 F.2d 376 (8th Cir. 1992) (*en banc*), however, he must show that he is so innocent that no reasonable juror could find him guilty. Any reasonable juror would be compelled to find a reasonable doubt as to Mr. Schlup's guilt because the state's evidence is riddled with contradictions, and direct evidence of Mr. Schlup's innocence is consistent with his alibi defense which is supported by a video-tape and the sworn affidavit of a corrections officer who recently came forward after hearing of news coverage about this case.

I. THE TESTIMONY OF THE STATE'S EYEWITNESSES IS UNRELIABLE.

Mr. Schlup's guilt is based entirely on two witnesses who claimed they saw him commit the crime. Many objective factors weigh heavily against the credibility of Roger Flowers and John Maylee. Furthermore, the jury was never told that Maylee had been convicted of three prior felonies.

A. NEITHER WITNESS HAD AN UNOBSTRUCTED VIEW OF THE CRIME.

Roger Flowers said that he saw the crime as he was pulling the master lever opening the cells on 1-walk. He was 35 to 40 feet away from the fight. (Trial transcript, hereafter Trial tr., p. 243). There were two rows of bars between him and the scene of the crime. (See Exhibit 33). There were a number of prisoners between him and the fight, but he cannot name any of them. (Trial tr., p. 275). He saw Rodnie Stewart carry a cup of liquid into 1-walk, but he did not see the other two perpetrators until after Stewart threw the cup in Arthur Dade's face. (Trial tr., p. 242). He never saw the knife, which officer Maylee claimed to have seen from the fourth floor. (Trial tr., p. 251).

John Maylee was stationed on the uppermost level of the four-tier housing unit. (Trial tr., p. 332), about 50 to 60 feet away from the fight. (State v. Stewart, p. 249). His deposition was read to the jury in lieu of his testimony.[1] Trial counsel vigorously argued that the crime could not be seen from Maylee's station. (Trial tr., pp. 349-52). Maylee's first described the incident:

> "I was standing at the lever box that opens and shuts inmates' doors, of HU-5B, 8 walk, when I turned and saw inmates (O'Neal), (Lloyd Schlup), (Rodnie Stewart), and (Arthur Dade), in what looked like a fight on 1 walk of HU-5A, approximately 10 feet west of the inner chain-link gate leading to the upper 1 walk walkway, near the storage room in cell number 43 . . . "

(Exhibit 31) (*emphasis added*). Officer Dan Bowers testimony indicates that Maylee's ability to view the scene from the top floor of the cell block was questionable. (Trial tr., p. 193-205). Maylee admitted that his attention was diverted away from the suspect that he identifies as the defendant. In O'Neal's trial, Maylee testified, "I saw Bob O'Neal. I focused my full attention on Bob O'Neal because he had the weapon." (State v. O'Neal, Tr., p. 288). This statement could have been used very effectively, especially in light of Maylee's admission that he never saw Officer Flowers (Tr., pp. 338-39), and he did not see what happened to Dade or the suspects he identified as Schlup and Stewart after O'Neal left the scene (State v. O'Neal, Tr., p. 318). Maylee later said that he first saw the three suspects approaching Dade as he was squatting down, looking through the

[1]Defense counsel stipulated to the admissibility of the deposition because Maylee was ill, incorrectly stating that there was sufficient foundation for its admission. Mr. Schlup was not present at the deposition. See Coy v. Iowa, 487 U.S. 1012 (1988).

stairs, watching the prisoners proceeding out of 1 and 2 walk toward the dining room. (State v. O'Neal, Tr., p. 255). He later put himself stooping down to look between the railings. (State v. O'Neal, Tr., p. 257). It is quite revealing that in the Stewart trial he admitted that he moved so that he could "get a better look," but by the time he did, "it was all over." (State v. Stewart, p. 246).

B. THE EVENT TOOK ONLY FOUR OR THAN FIVE SECONDS.

In Stewart's trial, Maylee said the crime happened very fast, "oh, four, five seconds maybe." (State v. Stewart, p. 245). Officer Maylee elaborated:

> Q. (by defense counsel) And so this whole thing just took a few seconds?
> A. Yes, it did.
> Q. And, in fact, it happened so fast that by the time you moved to get a better look it was all over?
> A. Yes, it was. The fight was over, yes.

(State v. Stewart, p. 246) (*emphasis added*). It is also beyond dispute that they saw the man they have identified as Mr. Schlup for only a fraction of that time. Flowers testified that he ran to the scene of the crime and grabbed Stewart; the other two fled just as he did so. (Trial tr., p. 243).[2] Maylee claimed that he watched the stabbing, and then saw O'Neal throw the knife out the window; he did not see what happened to the other two. (Trial tr., p. 338).

[2]Flowers first said that approximately a minute or two elapsed between the point that he saw Stewart throw the water and his taking Stewart into custody (transcript, p. 247), but later admitted that he had no idea how long the incident lasted. (tr. 279). In O'Neal's trial, he said it could have been "a second or a minute or two." (Exhibit 25, p. 342).

C. PRIOR STATEMENTS OF EACH WITNESS ARE INCONSISTENT.

1. Roger Flowers' prior inconsistent statements.

At trial, Roger Flowers said that he did not see which direction the other two ran after he grabbed Stewart. (Trial tr., p. 245). In Stewart's trial, Flowers said:

> Q. (by prosecutor) When you [grabbed Rodnie Stewart], what did Schlup and what did O'Neal do?
> A. They get up and run.
> Q. They got up and ran immediately, as soon as you grabbed him?
> A. As soon as I started pulling Stewart up, yes.
> Q. Did you see which direction they ran?
> A. They headed this way (indicating) when I last seen them, back toward the end of the walk.
> Q. That would be toward the end of the walk?
> A. Yes, right.
> Q. That is a dead-end, is it not?
> A. Right, it is.

(Tr. State v. Stewart, p. 85).[3]

This shift in his story is quite damaging; there are others as well. He gave three different versions of the assault. In Stewart's trial, he said he couldn't see if O'Neal and Schlup were hitting Dade as they were on the ground. (State v. Stewart, p. 82). In his deposition, he said Stewart hit Dade in the stomach as Dade lay on the ground (Deposition, p. 41), but in Stewart's trial he testified that Stewart was hitting Dade in the face, not the stomach. (State v. Stewart, p. 134). In Schlup's trial, he said that C.O. Dan Bowers had to use Flowers' keys to unlock a gate to assist Flowers. (Trial tr., pp. 275-276). In

[3] If Mr. Schlup ran down a dead-end corridor, in the opposite direction from the dining room, it is not likely that Sergeant Faherty would have seen him coming down the hall outside the dining room ahead of all the other prisoners. It is also unlikely that he would have been the first prisoner in line for lunch. It reflects on Flowers' veracity that he changed his testimony on this important point only for Mr. Schlup's trial.

Stewart's trial, he testified that he left the gate unlocked; Bowers entered the gate without a key. (State v. Stewart, p. 108).

2. John Maylee's prior inconsistent statements.

Maylee changed his testimony on many facts, including where he was when the murder happened, when he first saw it, and the conduct that he observed. In his deposition, he said that he saw Mr. Schlup, O'Neal and Stewart run against the flow of people bound for the dining room; on the day of the offense, he wrote that the fight was already in progress when he first saw it. (IOC, Feb. 3, 1984; also see part 1A, above). He also said in his IOC that he saw Dade run to the gate after he was stabbed. (Appendix D, Exhibit 7). In O'Neal's trial he said he did not see what happened to Dade after he was stabbed. (State v. O'Neal Tr., p. 318).

Maylee's deposition makes no mention of O'Neal and the others falling to the ground during the assault:

> Q: . . . you saw O'Neal hit Dade in the chest several times?
> A: Yes, Sir.
> Q: What's the very next thing that you saw?
> A: That's when the - the very next thing that I saw was Bob O'Neal break and run.

(Tr., p. 354) (*emphasis added*). In Stewart's trial he said that after the prisoners fell, he moved around the stairwell casing and ran to the bars:

> Q. . . . Do you know how long it took you to move around, or whatever?
> A. Approximately three seconds.
> Q. Okay, from the time that you moved around, when you got to here (indicating) did you look down again?
> A. Yes, sir, I did.
> Q. When you looked again, what did you see? Well, first what did you see then?

A. When I looked down again, I saw Bob O'Neal running down the walk, west, away from the incident.
Q. But, by the time that you got back to here and looked down again, were the three of them still there on top of Dade?
A. They were still in the act of getting up.
Q. Well, were three of them still there, or where was Arthur - where was Robert O'Neal?
A. Robert O'Neal is just started getting back when I looked back down there after the second position.
Q. Was he running?
A. He had been running west down 1 walk.

(State v. Stewart, Tr., pp. 173-75).

In O'Neal's trial, he gives a third version of this event:

Q. Sergeant Maylee, how long did it take you get from the B side of the upper catwalk over to the side?
A. One second, two seconds.
Q. How far of a distance is it?
A. Eight to ten feet.
Q. What were you concentrating on in terms of what were you looking at as you moved across?
A. I was watching Mr. O'Neal.
Q. Did you ever lose sight of him?
A. No.
Q. Even for a split second?
A. No.
Q. What did you next see him do?
A. He was running - got up and run down to the back of the walk which would be west.

(State v. O'Neal, Tr., p. 266).

D. FLOWERS AND MAYLEE CONTRADICT EACH OTHER ON SIGNIFICANT POINTS.

The accounts of Flowers and Maylee contradict each other. Maylee said O'Neal, Stewart and Schlup ran, together, against the flow of inmates who were moving toward the dining room, and saw them stop in front of Dade. (Trial tr., p. 332). Flowers said Stewart walked, alone, toward Dade's cell, O'Neal and Schlup approached Dade from the opposite direction. He kept his eye on Stewart the entire time. (Tr., p. 271-272). Although Maylee

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claimed to have seen the fight from beginning to end, he did not see Flowers intervene in the fight, contrary to Flowers' version of events. (Trial tr., p. 338-39).

Another significant discrepancy is that Maylee said that Stewart threw liquid in Dade's face, then Schlup jumped on his back, and O'Neal charged Dade from the front from a distance of eight feet away and struck Dade in the chest with an object in his right hand. (Tr., pp. 340, 343). Flowers' recollection was substantially different:

Q. (by prosecutor) And while Stewart was throwing that liquid into Mr. Dade's face what, if anything, did you see Schlup and O'Neal do?

A. They run and jumped on the man right about in here. Dade throwed his hands up in front of his face and kind of backed up. They run and jumped on his back, took him down in this corner behind this fence here.

(Tr., p. 250). According to Maylee, Dade was standing when he was stabbed by O'Neal from the front, and O'Neal never fell to the floor with the others; According to Flowers, Dade had to have been stabbed by O'Neal from behind after the three prisoners fell. Furthermore, Maylee puts O'Neal running away before Flowers broke up the fight. (Trial tr., pp. 338-39). This is contrary to Flowers' claim that O'Neal was still on the floor fighting when he grabbed Stewart.

II. MR. SCHLUP PRESENTED A CREDIBLE ALIBI DEFENSE AT TRIAL.

Mr. Schlup's cell was the closest one to the dining room. Bernard Eugene Bailey and Arthur St. Peter occupied cells on 2 walk very close to Mr. Schlup's. As the cells were opened for lunch, Bailey stepped out of his cell and talked to St. Peter about a Louie L'Amour book as they were walking to the dining room. They followed Mr. Schlup, about 8 or 10 feet behind, the

entire way from 2 walk to the dining room. They did not see anything unusual. (Trial tr., pp. 445-57). A video tape from a camera in the dining room showed that Mr. Schlup was the first man in line for lunch, followed by Ricky Easley, Bernard Bailey and Arthur St. Peter. (Trial tr., pp. 388-395). Cole County Deputy John Hemeyer interrogated Mr. Schlup and seized his clothing, shoes and handball. Laboratory tests revealed no trace of blood on Mr. Schlup's clothes.

III. EVIDENCE KNOWN TO COUNSEL OR THE STATE, BUT NOT THE JURY.

A. Lloyd Schlup's recorded statement.

Mr. Schlup has persistently asserted his innocence. The day it happened, he was interrogated by Investigator George Brooks and John Hemeyer. Mr. Schlup denied any involvement, and made a statement that proved to be true in every detail. He said that he was the first one down for lunch, and was followed by Ricky Easley, Bernard Bailey and Arthur St. Peter. The video tape proves this to be true. He said that before he got to the dining room he was reprimanded by a guard for shouting out of an opened window. Lieutenant Faherty's report indicated that this, too, is true.[4] Mr. Schlup speculated that the stains on his shoes were

[4]Upon hearing of recent news coverage about this case, Faherty sought out Mr. Schlup's counsel and made a sworn statement. He states:

> I have re-enacted my encounter with Mr. Schlup, and I can accurately state that Mr. Schlup was in my presence for at least two and a half minutes, and possibly three minutes. It would have taken him about thirty seconds to get from his cell to my line of sight. After he left me, he had another twenty-five to thirty-second walk to get to the dining room. He arrived in the dining room at least four to four and a half minutes after he left

probably ink. Laboratory tests revealed he was again telling the truth. Mr. Schlup said he went directly to the dining room. Because it was a warm day outside, he planned to go outside to play handball after lunch. Hemeyer seized a shirt, a pair of pants, shoes and a handball from Mr. Schlup.[5]

B. Antonio Washington told prison officials about a drug transaction between Dade and Charlie Hurt, a member of the Aryan Brotherhood. The drug deal went sour, and to get even Hurt stole Dade's gold chain. Dade threatened Hurt, and Hurt put out a "contract" for Dade's murder. The racial aspect of the crime lends an high degree of credibility to Lamont Griffin-Bey and several other African-Americans who would be highly unlikely to perjure themselves for Mr. Schlup if he participated in a white supremacist killing.

> the housing unit. He was in the dining room for a little over a minute when I received the radio call. I am positive that when I received the call, Mr. Schlup had left the housing unit at least five to five and a half minutes earlier. I do not see how he could have been involved in the stabbing.

Addendum 2, Affidavit of Robert Faherty, p.2. Mr. Schlup was not perspiring, breathing hard or nervous; "There was nothing about his behavior consistent with his just having been involved in a fight or a stabbing." Id., p. 3.

[5]Mr. Schlup testified in the penalty phase of his trial that he was not involved in the stabbing of Arthur Dade. The Prosecutor vigorously cross-examined him, and under Missouri Law, the Defense was then entitled to introduce into evidence the prior consistent statement that Mr. Schlup gave to prison investigators. Trial Counsel attempted to explore the statement in the guilt phase of the trial, and was prevented from doing so. (tr. 373-377). However, there was nothing to prevent the proper admission of that statement as rehabilitation of Petitioner during the penalty phase of his trial.

C. Witnesses in the O'Neal and Stewart trials.

When O'Neal testified that he stabbed Dade in self-defense, he said Mr. Schlup was not involved, stating, "at that time, I knew who Lloyd Schlup was, but I really made it a habit to stay from Lloyd Schlup. I didn't care too much for him." (Exhibit 17). Donnie Trendley testified in O'Neal's trial that Mr. Schlup was not on 1 walk during the fight. Mike Riley also testified in State v. O'Neal that he saw the fight, but did not see Mr. Schlup. Michael Dunn testified in Stewart's defense that he did not see Mr. Schlup near the scene of the crime.

IV. NEW EVIDENCE OF INNOCENCE.

Eye-witnesses present a compelling case that Mr. Schlup was not involved in the stabbing of Dade. Not a single inmate who saw or participated in the crime implicates Mr. Schlup in the stabbing in any way. Furthermore, a former corrections officer has recently come forward with information so persuasive that no reasonable juror could find Mr. Schlup guilty.

A. THE STATEMENTS OF ROBERT FAHERTY, JOHN GREEN AND THE VIDEO-TAPED ALIBI PROVES THAT IT IS IMPOSSIBLE FOR MR. SCHLUP TO BE GUILTY.

It is indisputable that Mr. Schlup was the first man in line for lunch when Dade was stabbed, and that he had been in the dining room for over a minute when the radio broadcast regarding the stabbing was made. Respondent filed with the court Exhibit T, which includes the statement of John Green, the clerk for Housing Unit 5, who told investigators on February 8, 1984, that he called the control center to alert authorities to the assault within seconds of the murder. The theory the state constructed to refute the video-taped proof of Mr. Schlup's innocence depended upon the assumption that Captain Eberle, who arrived at

the scene about three minutes after the stabbing, was the one who made this call. Mr. Green's statement refutes that theory:

> "I stepped out of the office and I heard Sgt. Flowers calling for officers cause they had a fight. Couldn't get nobody so he told me to call base to notify them of the fight and that's what I did."

(Exhibit T, p. 31). Mr. Green's statement is credible because there is no possible motive for Mr. Green to lie; no one knew of the existence of the video tape at the time of the interview, and he had no way of knowing how the information he was giving would affect the investigation. Because Mr. Green called the control center on the telephone as the assault was in progress, and Mr. Schlup was in the prison dining room for over a minute when the guards responded to the call, Mr. Green's testimony, if true, establishes the impossibility of Mr. Schlup's guilt. Neither the significance nor the credibility of his testimony can be dismissed without a hearing.

A second significant alibi witness has come forward, Lieutenant Robert Faherty. He is the corrections officer on the video tape seen reaching for his radio as the assault call was broadcast. He establishes that Mr. Schlup left the housing unit about five minutes before the radio call was made. He was stationed at the T-3 corridor shown on Exhibit 35. It would have taken Mr. Schlup about 30 seconds to get from the housing unit to Faherty's line of sight; Mr. Schlup was in that corridor with Faherty for two and a half to three minutes, and it would have taken another 25 to 30 seconds for Mr. Schlup to walk from T-3 to the dining room, where the camera proves he was for one minute and five seconds before the radio call was broadcast. By this time, Mr. Schlup had been gone from the housing unit for around

five minutes. Even if Captain Eberle made the call three to four minutes after the stabbing, Mr. Schlup was either on camera or with Officer Faherty when Dade was attacked.[6]

B. PERPETRATORS O'NEAL AND STEWART CLEAR MR. SCHLUP.

Robert O'Neal and Rodnie Stewart have provided the Court with affidavits that directly establish Mr. Schlup's innocence. O'Neal states:

> I was involved in defending myself from Arthur Dade in a fight on 1 walk. Lloyd Schlup was not involved in the fight. I did not see him prior to the fight nor did I see him in the area of the fight afterwards. I did not see him until I arrived in the dining room.

(Appendix A, Exhibit 5-A). In his affidavit, Rodnie Stewart states:

> I was housed in supermax at Jefferson City and saw the incident where Arthur Dade was killed. I never saw Lloyd Schlup around the area before, after, or during the incident. Lloyd's cell is the first one or two on the walk and he was usually the first one down to the dining room. I did not see him that day, except earlier in his cell.

[6]Officer Dan Bower also fixes the time of the stabbing at a point when Mr. Schlup was already gone from the housing unit. He had been in the housing unit, one level up from where the fight occurred. He was the first officer on the scene; Flowers had Stewart pinned against the gate. Flowers ordered him to get Dade on a stretcher, and he told inmate Ricky McCoy to get the stretcher off the wall. (Trial tr., p. 183, 245). In O'Neal's trial, he testified that it took McCoy "at the most thirty seconds" to get back with the stretcher. (State v. O'Neal, p. 363). Captain Eberle arrived just as they were loading Dade on the stretcher. The video tape shows Dade being carried out of the housing unit over a minute and a half after Mr. Schlup arrived in the dining room. For Mr. Schlup to be guilty, one would have to conclude that Dade lay bleeding on the floor for about six full minutes before being taken to the hospital. Dan Bowers establishes the contrary; he was shisked away from the scene within a couple of minutes.

(Appendix A, Exhibit 10-A). On June 27, 1984, Stewart told prison investigators that Randy a/k/a Rocky Jordan helped O'Neal kill Dade. In January, 1992, he told an investigator:

> Stewart said since Hurt was a member of the Aryan Brotherhood and he had been threatened, Robert O'Neal told him he wanted to "hit" Stump, or kill him. Stewart said that O'Neal came to him about killing Dade, and Stewart tried to talk him out of it. He said he didn't want anything to do with it, and he claimed that he told O'Neal that he was crazy for doing it.
>
> Stewart said that the day Dade was killed, Stewart knew O'Neal was going to do it because O'Neal had been drinking wine, which was some kind of home brew made in the penitentiary, and taking Benadryl and smoking dope. Stewart said O'Neal was really wound up, and he wanted Stewart to hold up a sheet so that the guards could not see him kill Arthur Dade.
>
> Stewart told me that Robert O'Neal got Rocky Jordan, also known as Randy Jordan, to help him kill Arthur Dade. Stewart said that when the doors opened for lunch, Rocky Jordan and Bob O'Neal ran to Dade's cell. He said that O'Neal threw hot water on Dade's face, using an orange cup, and that Jordan held Dade while O'Neal stabbed him.

(Exhibit 16, p. 2). Jordan is the man seen in the video tape sitting at the same table with O'Neal in the prison dining room.[7] Unlike Mr. Schlup, neither O'Neal nor Jordan went through the serving line to get a tray of food.

[7] Officer Faherty remembers Randy Jordan:

> [Randy Jordan] was known in the prison by officers and inmates alike as a person in the upper echelon of the Aryan Brotherhood. He had been in many rough prisons across the country and had a reputation as an "enforcer" for the Brotherhood. He was covered with tatoos; I remember one in particular that went clear across his back with the eagle wing symbol of the Aryan Brotherhood.

Addendum 2, p. 3. Counsel has discovered that Mr. Jordan is living in Joliet, Illinois. He refused to be interviewed.

C. NEW EYEWITNESSES CLEAR MR. SCHLUP.

Counsel for Mr. Schlup has attempted to locate and interview all of the prisoners who were incarcerated on 1 and 2 walk in housing units 5A and B on February 3, 1984. Several of them are now deceased, several have been released from prison, and several have not yet been located. Thus far in Counsel's investigation, not a single witness has implicated Mr. Schlup in the stabbing.[8]

Joseph Beck. Flowers and Maylee testified that Dade was stabbed in front of cell number 43. Mr. Joseph Beck, who occupied cell number 43 on February 3, 1984, signed an affidavit that states:

> On February 3, 1984, I was housed in supermax at the penitentiary in Jefferson City, Missouri, in cell 43. I witnessed the knifing of Arthur "Stump" Dade. It happened immediately in front of my cell, 3 - 3 1/2 feet away. Lloyd Schlup was not in sight, not even on the flag, where stabbing took place, never saw Schlup.

(Exhibit 9).

Stanley H. Price, the occupant of the cell next to Arthur Dade's, provides this account of the stabbing:

> When Stump came out, a guy threw bleach and water into his face and then stabbed him five times with a knife that I think was made from a mop ring or handle. Stump tried to get away, but was grabbed from behind by a guy they thought was Lloyd Schlup. Stump threw the guy

[8]The panel found some inconsistencies among some of the prisoner affidavits. Certainly, these are no worse than the inconsistencies in the testimony of the prosecution witnesses. Counsel has not withheld from the court the affidavit of any prisoner who was willing to discuss what he saw. However, at a jury trial, a reasonably competent attorney "might [be] somewhat selective in his evidence presentation, but would not...cast aside all the evidence in this case." Kenley v. Armontrout, 937 F.2d 1298, 1309 (8th Cir. 1991). The point counsel wishes to make here is that not a single prisoner who occupied housing Unit 5 implicates Mr. Schlup in the homicide. The same cannot be said of any of the actual perpetrators.

> off, but collapsed. I was 10 to 15 feet from the murder. I know Lloyd Schlup did not take part in the killing and was not even in the area when it happened.

(Exhibit 7). Until counsel located Price, no one knew what was in the container that was splashed into Dade's face. Price's description of the weapon is identical to the weapon that was recovered.

Emmett Nave states that on February 3, 1984:

> I was released to go to the dining room between 11:00 and 11:30 a.m. I observed Lloyd Schlup going down the stairs in front of me leading to the tunnel to the dining room. To the right of me, I heard a commotion and saw a fight. Lloyd Schlup was approximately 10 feet in front of me, in the tunnel area. He was not near or involved in the altercation.

(Exhibit 6, 6A). Jack Babcock was with Nave, and provides a very consistent account. (Exhibits 10, 10A).

Gary Sonnenberg and Darnel Duckett saw the stabbing, and have signed affidavits that Mr. Schlup was not involved. (Exhibits 5, 5A, 8).

Lamont Griffin-Bey. The stabbing was planned and carried out by members of the Aryan Brotherhood. Griffin-Bey told investigators shortly after the homicide that he saw the murder. Griffin-Bey was aware that O'Neal and Stewart were suspected of the murder, but he also said there was a third person involved who was not charged:

Dearixon:	What did he look like?
Griffin-Bey:	I can't even describe the man.
Brooks:	How do you know they don't got him then?
Griffin-Bey:	Because I know who they got.
Dearixon:	Who have they got?
Griffin-Bey:	They got . . . this guy . . . Bob O'Neal. They got this other little guy, I can't recall his name, but him and Bob was living on the same walk I was on . . . Stewart, Stewart.
Brooks:	Rodnie Stewart?

Griffin-Bey: Yeah. I don't know . . . they said they had a third person or something like that, . . . but they ain't got this guy right here.

Brooks: Was Bob O'Neal or Rodnie Stewart be the one that you saw . . . ?

Griffin-Bey: I am not going to comment on that, you know, ... this is too serious for me.

(Exhibit 1A). Griffin-Bey knew Lloyd Schlup to be wrongly accused of being involved in the stabbing of Arthur Dade. Griffin-Bey's recent statement proves this is the case:

> " . . . on February 3, 1984, I was housed in supermax at the penitentiary in Jefferson City, Missouri. I witnessed the knifing of Arthur Dade on this date. I saw two men and the victim involved in the knifing. I did not see Lloyd Schlup involved in the knifing. I did not see Lloyd Schlup around the area and I was standing approximately 10 feet away from where the incident happened."

(Exhibit 1).

Donnell White. White was Dade's friend. He was walking approximately 3 feet from Dade when he saw three inmates approaching from the opposite direction. One threw something in Dade's face while two others jumped him. One of them threw the knife out the window, while the other one ran. White is certain the Lloyd Schlup is innocent and that the third inmate has never been prosecuted. (Exhibit 11). James Pierce and Courtney Lovelace are other African-American prisoners who have sworn that Mr. Schlup was not involved in the murder. (Exhibits 12, 13).

V. THE EVIDENCE THAT MR. SCHLUP IS INNOCENT IS TOO CREDIBLE TO DISMISS WITHOUT A HEARING; NONE OF THE CONCERNS ABOUT THE CREDIBILITY OF LATE AFFIDAVITS OF PRISONER-WITNESSES APPLIES TO EVERY WITNESS.

The district court found the testimony of eyewitnesses to the stabbing is "suspect" because it was produced "after a long delay," and because "fellow inmates...do not...have a strong

incentive to refrain from perjuring themselves," (Memorandum and Order, p. 12). A full and fair hearing would have demonstrated that not every witness can be so easily dismissed.

A. THE DELAY IN PRESENTING THIS EVIDENCE IS NOT FATAL TO ITS CREDIBILITY

1. John Green, Lamont Griffin Bey, Ricky McCoy, Donnie Trendley and Van Roberson came forward immediately after the crime.

Several witnesses, including John Green[9] and Lamont Griffin Bey, made statements within a day of the stabbing consistent with the affidavits they later provided.[10] Van Roberson, Donnie Trendley and Ricky McCoy came forward, too, but they are now dead. However, it is clear from the questioning that the investigators were not interested in hearing anything inconsistent with the guilt of the suspects they were holding. When a prisoner said he had seen the stabbing, they didn't even ask who was involved. As far as they were concerned, they had their suspects.

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[9] Officer Faherty remembers several of these men. He said, "John Green, Jack Babcock, Emmett Nave, Joe Beck and Arthur St. Peter are people who have never lied to me, and I would listen to what they have to say, especially John Green. I always thought he would succeed when he got out of prison. He was a unit clerk because he was more credible, reliable and trustworthy than other prisoners, and because he had at least minimal office skills." Addendum 2, p. 3.

[10] The district court noted that Mr. Schlup's mother urged every attorney who ever represented her son to talk to the prisoners who told prison investigators that they saw the murder, and, incredibly, not one single attorney lifted a finger to do this investigation until early 1992. The circumstances of the delay in presenting their affidavits reflect more on the integrity of the bench and bar than it does on the credibility of the witnesses.

2. **There are reasonable explanations for witnesses' not coming forward that do not reflect on their credibility.**

The witnesses who were not discovered earlier should not be ignored for that reason alone. There are facts and circumstances which explain the delay in discovering some of the prisoner witnesses, including the racial tensions in the cell block before and after the stabbing, the identity and methods of the prison investigators, and the fact that no attempt had previously been made on Mr. Schlup's behalf. Prisoners who saw the crime believed that had they admitted seeing it, they would have been pressured by prison officials to "snitch." The stabbing heightened racial tensions in the prison because it was a "hit" of an African-American inmate (Dade) by the Aryan Brotherhood. Many witnesses in Respondent's Exhibit T refer to the racial tension in the prison as the reason for not wanting to answer questions.[11] When Maurice Ford was asked whether the possibility of further retaliation made him tense, he replied, "oh, hell yes." (Respondent's Exhibit T, p. 19). Joe Beck heard rumors about African-American prisoners retaliating for Dade's death. (Id., p. 17). The majority of inmates took the safest course of action, which is simply not to be a witness.

Although the stabbing occurred in a crowded cell block, only Lamont Griffin-Bey and Ricky McCoy were willing to tell investigators who was involved in the stabbing. Prisoners who

[11] "[S]ometimes you see or don't see that's the best way to stay healthy, you see what I'm saying . . . " (interview of inmate Van Roberson, Respondent's Exhibit T, p. 15). Based on Roberson's statement, and the fact that he has been released from prison, Petitioner believed he would be likely to provide reliable testimony establishing Petitioner's innocence. Counsel learned from Roberson's mother that he died about three years ago.

were unwilling to talk freely to prison guards would have talked with a defense attorney. It is certain that many prisoners who said they did not see the murder were not being truthful; the murder happened on a crowded cell block. There were many eye-witnesses besides the two guards and the two prisoners.

B. **MANY INMATES WHO SAW THE CRIME HAVE A STRONG MOTIVE TO REFRAIN FROM PERJURING THEMSELVES.**

Although the Court dismissed prisoner testimony because "fellow inmates . . . do not . . . have a strong incentive to refrain from perjuring themselves," (Memorandum and Order, p. 12), this is not an accurate observation in this case.

1. **It is unlikely that African-American prisoners would perjure themselves if Mr. Schlup were guilty.**

Many of the prisoners who saw the murder, including Emmett Nave, Donnell White, Van Roberson, Ricky McCoy, Courtney Lovelace and James Pierce, are African-Americans, some of whom belong to Black prison gangs. They have a strong disincentive to perjure themselves for a white man convicted of stabbing Dade. Donnell White was standing right next to Dade when the stabbing took place. Dade was his friend. He has no motive to perjure himself for the assassin of his friend.

Several prisoners say in their affidavits that they are reluctant to name the third perpetrator for fear of their own safety. Although these men told counsel that Randy Jordan was involved in the stabbing, they were unwilling to put his name in their affidavits, and expressed reluctance at coming to a hearing at which they would have to name Mr. Jordan as the man who assisted O'Neal and Stewart in the stabbing of Arthur Dade. Counsel has no power to offer them protection of any kind for

their cooperation. However, at an evidentiary hearing, counsel would invoke the subpoena power of the court to compel them to name the real perpetrators.

2. John Green has not been incarcerated since 1986; he has a strong motive against perjuring himself.

Many of the persons known to have been at the scene of the crime on February 3, 1984, are still incarcerated. Because of state laws protecting the confidentiality of parole records, it is difficult to locate those who have been released. John Green was released in January of 1986, and has worked steadily and lived a law-abiding life ever since. He is married and living on a farm in north central Kansas. He has a lot to lose by committing perjury; it is unreasonable to expect he would do so for a man he could not have communicated with in over eight years.

C. THE EYE-WITNESS TESTIMONY OF INNOCENCE IS CONSISTENT WITH MR. SCHLUP'S VIDEO TAPED ALIBI.

The district court never mentioned the video tape which shows that Mr. Schlup was in the dining room when Dade was stabbed. The tape is irrefutable corroboration of the prisoner witnesses, and it shows that the guards' identification of Mr. Schlup is mistaken. It establishes the following sequence of events:

0:00 Mr. Schlup enters the dining room;

1:05 Guards run out of the dining room in response to radio alert;

1:31 Robert O'Neal runs into the dining room, and along the back wall toward the rest room as Mr. Schlup carries his tray to a table. Investigator George Brooks testified that he ran from the scene of the crime to the dining room in 33 seconds, walked it briskly in one minute and three seconds, and walked it

at a normal pace in one minute and thirty seven seconds. (Trial tr., pp. 465-66).

1. The testimony and affidavit of Lieutenant Robert Faherty prove that Mr. Schlup did not commit the murder and dash to the dining room.

Before Mr. Schlup showed up in the dining room, Officer Robert Faherty saw him coming down the corridor, and stop to shout at another prisoner through an open window. (Trial tr., pp. 315-16). Faherty searched him before he continued on to the dining room. This is a long hallway, and Officer Faherty said that besides hollering out the window, there was nothing unusual about his behavior. Mr. Schlup was walking leisurely down the hallway with his hands in his pockets. He was not red in the face, nervous or short of breath. Officer Faherty had seen many fights and stabbings during his career at the missouri State Penitentiary. He notes that "the prisoners involved are invariably mad, scared, excited, out of breath or otherwise hyped up on adrenalin. Lloyd was none of those things." (Addendum 2, p. 3). He also swears that because of the time he spent with Mr. Schlup, "I am positive that when I received the call, Mr. Schlup had left the housing unit at least five to five and a half minutes earlier. I do not see how he could have been involved in the stabbing." (Addendum 2, p. 2).

2. Robert O'Neal's entry into the dining room one minute and thirty one seconds after Mr. Schlup proves that Mr. Schlup could not have been at the scene of the crime.

Officer Brookes testified that he could run from the scene of the crime to the dining room in less than 35 seconds. Immediately after stabbing Dade, O'Neal fled. (Trial tr., p. 251). Flowers did not see where he went. Maylee said that he

ran about 35 feet to a window, broke it, and threw the knife out. (Trial tr., p. 338). He then ran to the utility sink, rinsed the blood off, and ran to the dining room.[12] Larry Farris, one of the officers seen on the video tape running out of the dining room, saw O'Neal hurrying down the last flight of stairs between T-3 and the dining room. (Trial tr., p. 322-26).[13] Farris saw blood on O'Neal's trousers, so he followed him back to the dining room. Allowing a full minute for O'Neal to hurry from the scene of the crime to the dining room, Mr. Schlup had already been on camera for thirty seconds when O'Neal fled the scene. Even generously allowing a couple of minutes for O'Neal to throw the knife out the window and wash in the sink, Mr. Schlup was in the presence of Robert Faherty when O'Neal stabbed Dade.

By suggesting that radio was the only means of communication from the cell block,[14] that the assault call went out when Captain Eberle arrived on the scene with his radio,[15] and that this event took place several minutes after the stabbing, the prosecutor tried to show that the murder happened at least two

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[12]The prosecutor on opening statement said, "O'Neal, who had the knife, ran to a window nearby, broke out the window and threw the knife out the window. And then also ran to the dining room area. First tried to wash some blood off his hands and then ran to the dining room area." (Trial tr. p. 106.) (emphasis added).

[13]No attempt was made at Mr. Schlup's trial to determine whether Mr. O'Neal was walking or running when Officer Farris encountered him. In O'Neal's trial, Farris testified that O'Neal was "walking down the steps hurriedly." (Trial tr., State v. O'Neal, p. 412).

[14]It was not; there is a telephone in the office next to the stairway.

[15]This is not so; Joe Green put out the call as the assault was taking place.

minutes before Mr. Schlup appeared in the dining room. Mr. Schlup has produced proof, which could not have been fabricated, that the call to which the guards responded came inside of a minute after the stabbing. This proof includes the statement of Joe Green and the testimony of corrections officers who passed Robert O'Neal in the hallway as he was fleeing the scene of the crime.

William Foster did not see the crime, but was on the way to the dining room when he heard the commotion on the cell block. Within seconds of the commotion beginning, he had to step aside for the guards who were running out of the dining room. He turned and followed them, and he ended up being one of the prisoners who carried Dade to the hospital. If this man is telling the truth, Mr. Schlup was already in the dining room when the murder happened. When counsel interviewed Mr. Foster, he could not have understood the significance of this fact. The court has not heard his testimony; counsel is convinced he is telling the truth.

Robert O'Neal, who is on death row after being convicted in this crime, found several prisoners to testify that he acted in self-defense. Rodnie Stewart, who is serving a sentence of life without parole after being convicted in this crime, found three prisoners who testified in support of his claim that he was merely an innocent by-stander when Dade was stabbed. Other prisoners exist who support neither O'Neal's claim nor Stewart's claim. Some prisoners dispute the defenses presented by O'Neal and Stewart. However, all prisoners, whether or not they lied for O'Neal or Stewart, swear that Mr. Schlup was not there. Not a single prisoner, Black or White, has said that Mr. Schlup

participated in the crime. It is remarkable that only Mr. Schlup has the unanimous support of prisoner testimony. It is also remarkable that while only white prisoners came to the defense of O'Neal and Stewart, many African-American prisoners have stepped forward to say that Lloyd Schlup is innocent, including one who did so in February, 1984.

Mr. Schlup has tendered a volume of evidence overwhelmingly showing his innocence. Mr. Schlup has shown that he is probably innocent with far greater quality and quantity of evidence than that presented in Herrera v. Collins, 113 S.Ct. 853 (1993). A hearing would show that any reasonable juror would be compelled to find a reasonable doubt that he is guilty.

WHEREFORE, Mr. Schlup moves for a stay of execution to permit him to petition the Court for a writ of certiorari, and for such other relief as the Court deems appropriate.

Respectfully submitted,

Sean D. O'Brien, #30116
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Attorney for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was mailed this ____ day of November, 1993, to:

Mr. Frank Jung
Assistant Attorney General
Post Office Box 899
Jefferson City, Missouri 65102

Attorney for Petitioner

AFFIDAVIT OF ROBERT FAHERTY

Comes now affiant, Robert Faherty, and first being duly sworn, states as follows:

1. I was employed as a corrections officer for the Missouri Department of Corrections from September of 1979 to February of 1989, when I left the department at the rank of captain. In February of 1984, I was a lieutenant. The entire time I was with the department, I was stationed at the Missouri State Penitentiary in Jefferson City, Missouri.

2. On February 3, 1984, I was the Zone Lieutenant for the Special Management Unit. Attached to this affidavit is an accurate diagram of the corridor leading to the area where I was stationed. At lunch time, I was stationed in the dining room. Because no one was available to watch the T-3 door, I stood at that station until I could be relieved by another officer. Then I went to the dining room.

3. The door at T-3 is supposed to be locked except when opened by an officer for inmate movement in and out of the dining room. It is secured at all times. The door was locked when I arrived at the station, and I signalled base control to unlock the door. The officer in the control center unlocked the door by remote control. I opened the door and pushed it back so it would stay open for the lunch traffic.

4. A few seconds after I opened the door, I saw Lloyd Schlup coming down the corridor toward me. He was walking a leisurely pace with his hands in his pockets. There was nothing unusual about him. Lloyd stopped at a window a few feet from me and shouted at someone outside. I told him to get out of the window, and he came over to the door where I was standing. I patted him down, and he went on to the dining room. Lloyd was not perspiring or breathing hard, and he was not nervous. There was nothing at all about his behavior consistent with his just having been involved in a fight or a stabbing.

5. Other prisoners came down the hall behind Mr. Schlup. Shortly after my encounter with Mr. Schlup, I was relieved by another officer, who I think was Curtis Bittle. I then went to the dining room. I was standing at the rail by the serving line with officer Clementage when I heard an assault broadcast over my radio, and officers ran to the housing unit. I ran with them, but I never made it to the housing unit because I met Captain Eberle at the bottom of the stairs leading to the housing unit, and he sent me outside to recover the weapon that was used in the assault.

6. I have re-enacted my encounter with Mr. Schlup, and I can accurately state that Mr. Schlup was in my presence for at least two and a half minutes, and possibly three minutes. It would have taken him about thirty seconds to get from his cell to my line of sight. After he left me, he had another twenty-five to thirty-second walk to get to the dining room. He arrived in the dining room at least four to four and a half minutes after he left the housing unit. He was in the dining room for a little over a minute when I received the radio call. I am positive that when I received the call, Mr. Schlup had left the housing unit at least five to five and a half minutes earlier. I do not see how he could have been involved in the stabbing.

7. I am familiar with many of the prisoners who have said that they saw the crime, and while it is true that many inmates cannot be believed, this is not true of all the men who said they saw the crime. John Green, Jack Babcock, Emmett Nave, Joe Beck and Arthur St. Peter are people who have never lied to me, and I would listen to what they have to say, especially John Green. I always thought he would succeed when he got out of prison. He was a unit clerk because he was more credible, reliable and trustworthy than other prisoners, and because he had at least minimal office skills. I am also familiar with Randy Jordan. He was known in the prison by officers and inmates alike as a person in the upper echelon of the Aryan Brotherhood. He had been in many rough prisons across the country and had a reputation as an "enforcer" for the Brotherhood. He was covered with tatoos; I remember one in particular that went clear across his back with the eagle wing symbol of the Aryan Brotherhood. I don't really know Lamont Griffin Bey, Ricky McCoy or Stanley Price, so I can't say anything about them one way or another.

8. At the time of the stabbing, it was written procedure in the housing unit that only one walk would be released for lunch at a time, and the next walk would not be released until all of the prisoners from the other walks had cleared the housing unit. This procedure was not followed on February 3, 1984, because prisoners from two walk were able to get to one walk. This would not have happened had procedure been followed. Sargeant Flowers was the Housing Unit supervisor, and it would have been up to him to follow post orders.

9. I testified at Lloyd's trial, but I was never asked how long Lloyd and I were together in the hall. I have never talked to a defense attorney about Lloyd's case before today. When I was a corrections officer, I was cynical about prisoners and I believed that they were all guilty, and I would not have voluntarily come forward to talk with a defense lawyer. If a defense lawyer had come to see me, I would not have lied to him, but I wouldn't have volunteered any information, either. It is kind of an unwritten rule among corrections officers not to cooperate with defense lawyers.

10. Lloyd Schlup could not be guilty of this crime. Over the ten years I was at MSP, I have seen many fights and stabbings, and the prisoners involved are invariably mad, scared, excited, out of breath, or otherwise obviously hyped up on adrenalin. Lloyd was not any of those things. Also, after learning of all the information in the article, I know that it is not possible that Lloyd could have spent as much time with me as he did and still have been involved in the crime. I have looked at the affidavits and statements of various prisoner, and I recognize several of them as people who are more credible than the typical inmate.

11. I live alone, and I do not have a telephone. A friend read an article in the Columbia Missourian about Lloyd's case and mentioned it to me. I called the paper from a public phone, and they put me in touch with Bill Curry. I am coming forward now because, based on what I know, Lloyd Schlup cannot possibly be guilty, and saying what I know is the right thing to do.

12. I am willing to testify in court.

FURTHER, AFFIANT SAYS NAUGHT.

RAF Jmt

Robert Faherty

State of Missouri)
) ss
County of Jackson)

Subscribed and sworn before me this 26th day of October, 1993.

Beverly S. Taylor

Notary Public

My commission expires:

B. 11/3/93

Notary Public - State of Missouri
Commissioned in Clay County
My Commission Expires Nov. 3, 1993